Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

JOHN ANTHONY SHEEHAN,

Petitioner,

versus

JOHN P. WHITLEY, WARDEN AND
STATE OF LOUISIANA,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit
Civil Appeal No. 96-30008**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Constitutional violations in this case are so basic, so fundamental, so compelling, that it is astonishing that Petitioner has to request discretionary review by this Court.

John Sheehan was convicted by a 10 to 2 vote – the minimum necessary to convict – and the jury foreman hid the fact that he is an active reserve deputy with the very Sheriff's Department that investigated the alleged offense, and that he is the friend of the prosecution's key police witness. The foreman had even consulted an attorney about the effect of his deputy status before reporting for jury duty.

The District Court found that the extreme and extraordinary nature of the case required the application of the implied bias doctrine.

The First, Seventh, Ninth, Tenth, and Eleventh Circuits have ruled that implied bias is a question of law beyond the reach of the presumption of correctness whereas the Fifth Circuit below reversed the District Court on the issue by applying the presumption of correctness to the state court's ruling. The Fifth Circuit panel's ruling has created a dangerous split of authority among the various circuit courts of appeals which threatens the interests of persons legitimately deserving of *habeas* relief:

1. Is implied bias a question of law which falls outside the presumption of correctness, entitling petitioner to independent federal review?

QUESTIONS PRESENTED FOR REVIEW – Continued

2. Does Justice O'Connor's concurring opinion in *Smith v. Phillips*, 102 S.Ct. 940, 948-949 (1982), accurately reflect the applicable standard that in exceptional situations, like this one, which require a finding of implied bias, that the lower federal courts should not be deterred from independent review by the presumption of correctness?

3. Do the Sixth and Fourteenth Amendments permit an innocent man to be condemned to life in prison based upon a conviction orchestrated by a jury foreman who lied about critical facts going to the heart of potential juror partiality to get on the jury?

PARTIES

The parties appearing in the United States Court of Appeal were, John Anthony Sheehan, plaintiff-appellee, represented by Lewis O. Unglesby and Aidan C. Reynolds of the law offices of Unglesby & Koch, 246 Napoleon Street, Baton Rouge, Louisiana 70802 and Charles A. Riddle, III, Post Office Box 315, Marksville, Louisiana 71351; and John P. Whitley, Warden of the Louisiana State Penitentiary and the State of Louisiana, respondents-appellants, represented by Richard P. Ieyoub, Attorney General; Eddie Knoll, District Attorney, and David Lafarque, Assistant District Attorney, of the Office of the District Attorney, Twelfth Judicial District.

In light of the Court of Appeal's reversal of the District Court's judgment in his favor, John Sheehan now petitions this Honorable Court for writ of certiorari to correct the split of authority among the circuits and the patent legal error made by the Court of Appeal below.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties iii

Table of Contents iv

Table of Authorities vi

Citations to Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

I. Preliminary Statement 3

II. Factual Background 3

III. Action of the District Court and Court of Appeals 13

Summary of the Argument 14

Reasons For Granting the Writ 16

I. THE FIFTH CIRCUIT'S APPLICATION OF THE PRESUMPTION OF CORRECTNESS TO A QUESTION OF LAW IS IN CONFLICT WITH SEVERAL DECISIONS OF OTHER COURTS OF APPEALS NECESSITATING CORRECTION AND CLEAR GUIDANCE FROM THIS COURT 18

II. THE SIXTH AND FOURTEENTH AMENDMENTS DO NOT PERMIT AN INNOCENT MAN TO BE CONDEMNED TO LIFE IN PRISON BASED ON A CONVICTION ORCHESTRATED AND INFECTED BY A PRESUMPTIVELY BIASED JURY FOREMAN 21

Conclusion 30

TABLE OF CONTENTS – Continued

Page

Appendices..... App. 1

1. Unpublished Decision of Court of Appeal, Fifth Circuit, March 11, 1997.....App. 1

2. Minute Entry Referring Petition to Magistrate, May 15, 1995.....App. 35

3. Report and Recommendation of Magistrate Judge, October 3, 1995.....App. 36

4. Judgment of U.S. District Court, November 21, 1995..... App. 60

5. Ruling of Court of Appeal On Suggestion For Rehearing En Banc (Treated as a Petition for Panel Rehearing), April 9, 1997..... App. 61

6. Local Rule 35 and Internal Operating Procedure for the Fifth Circuit Court of Appeal – Treatment of Suggestions for Rehearing En Banc As Petitions for Panel Rehearing.....App. 63

7. *State v. Sheehan*, 515 So.2d 670 (La. App. 3rd Cir. 1987).....App. 64

8. *State v. Sheehan*, 519 So.2d 129, 3 (La. 1988).....App. 80

9. *State v. Sheehan*, 533 So.2d 4, 1 (La. 1988)..App. 81

10. *State v. Sheehan*, 558 So.2d 758 (La. App. 3rd Cir. 1990).....App. 82

11. *State v. Sheehan*, 566 So.2d 394, 2 (La. 1990).....App. 100

12. 28 U.S.C.A. 2254(d) (pre-ADEPA amendment).....App. 101

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Amirault v. Fair, 968 F.2d 1404 (1st Cir. 1992) 20

Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991) 19

Crawford v. United States, 29 S.Ct. 260 (1909) 24

Gonzales v. Thomas, 99 F.3d 978 (10th Cir. 1996), cert. denied, 117 S.Ct. 1342 (1997) 18, 19

Hunley v. Godinez, 975 F.2d 316 (7th Cir. 1992) (per curiam) 19

McDonough Power Equipment, Inc. v. Greenwood, 104 S.Ct. 845, 849 (1984) 13, 16, 20

Smith v. Phillips, 102 S.Ct. 940, 948 (1982) 16, 17, 18, 19

Swain v. Alabama, 85 S.Ct. 824, 835 (1965) 29

Thompson v. Koehane, 116 S.Ct. 457 (1997) 21

Tinsley v. Borg, 895 F.2d 520 (9th Cir. 1990) 19, 20

Tumey v. State of Ohio, 273 U.S. 520, 532 (1927) 18

United States v. Allsup, 566 F.2d 68 (9th Cir. 1977) 20

United States v. Burr, 25 Fed. Cas. at p. 50, No. 14692 g. (C.C. Va. 1807) 18, 28

United States v. Bynum, 634 F.2d 768, 771 (4th Cir. 1980) 23

United States v. Haynes, 398 F.2d 980, 984 (2nd Cir. 1968) 28

United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976) 22, 30

United States v. Perkins, 748 F.2d 1519, 1533 (11th Cir. 1984) 23

United States v. Scott, 854 F.2d 697 (5th Cir. 1988) 22, 23, 25, 29

TABLE OF AUTHORITIES – Continued

Page

LOUISIANA CASES:

State v. Mitchell, 475 So.2d 61 (La. App. 2nd Cir. 1985) 24

State v. Simmons, 390 So.2d 1317, 1318 (La. 1980) 24

UNITED STATES CONSTITUTION:

Sixth Amendment 2, 13, 28

Fourteenth Amendment 2

STATUTES:

28 U.S.C.A. 2253 1

28 U.S.C.A. 2254 13

28 U.S.C.A. 2254(1) 2

28 U.S.C.A. 2254(d) 2, 20, 21

CITATIONS TO OPINIONS BELOW

The Report and Recommendation of Magistrate Judge for the United States District Court, Western District, is unreported, Civil Action No. 94-2249 (Appendix 2).

The Judgment of the United States District Court, Western District, is unreported, Civil Action No. 94-2249. (Appendix 3).

The Opinion of the Court of Appeals for the Fifth Circuit is unreported, No. 96-30008. (Appendix 4).

The Opinion of the Third Circuit Court of Appeal, reversing petitioner's conviction and sentence is reported at 515 So.2d 670 (La. App. 3rd Cir. 1987). (Appendix 7).

The subsequent denial of the state's application for certiorari and/or review to the Louisiana Supreme Court is reported at 519 So.2d 129, 3 (La. 1988). (Appendix 8).

The Opinion of the Louisiana Supreme Court remanding the case back to the district court for evidentiary hearing on the motion for a new trial because of newly discovered evidence is reported at 533 So.2d 4, 1 (La. 1988). (Appendix 9).

The Opinion of the Third Circuit Court of Appeal, affirming petitioner's conviction and sentence is reported at 558 So.2d 758 (La. App. 3rd Cir. 1990). (Appendix 10).

The denial of petitioner's application for writ of certiorari to the Louisiana Supreme Court on the issues raised in petition for writ of habeas corpus is reported at 566 So.2d 394, 2 (La. 1990). (Appendix 11).

STATEMENT OF JURISDICTION

This federal action began with a petition for writ of habeas corpus filed in the United States District Court for the Western District of Louisiana. The Magistrate Judge and District Court Judge concluded that John Sheehan's 1988 conviction was unconstitutional. The District Court entered judgment on November 27, 1995, granting Sheehan a conditional writ of *habeas corpus* from his invalid 1988 conviction with an order for his release upon the state's failure to re-try him within sixty days of the entry of judgment.

The State appealed and the Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C.A. 2253. On March 11, 1997,

the panel reversed the District Court. On April 9, 1997, the Court of Appeal, treating his timely filed Suggestion for Rehearing En Banc as a Petition for Panel Rehearing in accordance with the Court's local rules and IOPs governing rehearings, denied John Sheehan's request for rehearing. Accordingly, this Honorable Court has jurisdiction over this matter pursuant to 28 U.S.C.A. 2254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves egregious violations of the Sixth Amendment, Constitution of the United States, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

and the Fourteenth Amendment which provides in relevant part:

> . . . [N]or shall the State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the misapplication of 28 U.S.C.A. 2254(d), as the provision read before the recent AEDPA amendment. (See App.12) As well as, the misapplication of the presumption of correctness now contained in § 2254(d), which provides in pertinent part that a writ of *habeas* shall only issue where the petitioner shows that the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

I. Preliminary Statement.

John Sheehan is innocent. Nevertheless, he is serving a life sentence in the Louisiana State Penitentiary without ever receiving the fair trial promised to him by our Constitution. This is an extraordinary and extreme case that cries out for the habeas relief ordered by the District Court below. The constitutional violations are so fundamental and egregious that the petition must be granted to correct the split of authority in the circuits, and finally provide clear guidance for the Courts of Appeals in future cases.

The Fifth Circuit panel's reversal of the District Court's judgment has turned the standard of review governing the legal question of implied juror bias on its head in favor of blind adherence to the tortured rulings of the elected trial judge in the small, country town of Marksville, Louisiana.

John was narrowly convicted for the accidental death of his wife led by a foreman who lied to get on the jury. The foreman, David Trimbur, was an active reserve police officer with the Sheriff's Office which investigated the alleged offense, and as it turns out, the friend of the lead detective in the case, Detective Venable. Trimbur even sought out the advice of a local attorney concerning the possible effect of his deputy status before reporting for jury duty.

The case was built almost solely upon the circumstantial bits and pieces of the lead detective's memory of the "crime scene", after he "lost" and/or "accidentally destroyed" critical pieces of evidence such as photos of the so-called "crime scene" and the blouse John's wife was wearing. Detective Venable's credibility and memory was the primary issue at trial. Had all of these items of evidence not been lost or destroyed before trial, they could have been used to tangibly refute the prosecution's case.

II. Factual Background.

On April 30, 1986, John Sheehan and his wife, Monica, and their infant son, were visiting John's grandparents in the tiny Louisiana town of Dupont near Marksville. While his grandfather was out crawfishing, John decided to help him by cleaning his

grandfather's shotgun with oil and a rag. His wife left the den briefly to put their infant son down for a nap. When she returned, she seated herself, cross-legged, on the den floor facing John as he continued to rub the oily cloth over the gun. Unknown to John, his grandfather had left two shells in the gun which to John's knowledge and experience, he'd never done.

While John was wiping the gun down, John, his wife, and his grandmother were visiting and talking about their family crawfishing business, the gun accidently discharged striking his wife in the upper left shoulder and chest.

John's severely handicapped brother, Martin, who was sitting right by Monica was unhurt. John's grandmother, who was standing in the kitchen just off the den (the two rooms being separated by a bar rather than a wall) sent John to find his grandfather and telephoned for help. John's wife died before help could arrive.

The coroner and Detective Venable on the case ruled the death accidental, but because Sheehan had recently increased the life insurance on his wife, Venable, urged on by Mrs. Sheehan's family, pursued his theory that Sheehan had purposely killed his wife for the insurance proceeds.

In November of 1986, John Sheehan was tried for the death of his wife in Marksville. The state's circumstantial case developed, sponsored, and recreated from memory by Venable resulted in John's narrow ten to two conviction, the minimum required for conviction. The Louisiana Court of Appeals, however, reversed and remanded in light of Detective Venable's violation of *Miranda*. *State v. Sheehan*, 515 So.2d 670 (La. App. 3rd Cir. 1987) (App.7).

Given the extensive, sensational media coverage of his arrest, trial, and conviction in this small community, Sheehan then filed a Motion to Change Venue. The judge denied the motion. Sheehan was retried in Marksville in April 1988, again before the same judge. On April 30, 1988, he was convicted by a narrow ten to two verdict.

After the trial, the defense learned that foreman Trimbur had concealed the fact that he was an actively commissioned reserve deputy with the Avoyelles Parish Sheriff's Office. The defense also learned that he was in fact a close personal friend and confidante of the lead detective in the case, Detective Venable. During jury

selection, Trimbur denied any relationship with the prosecuting authorities and any close relationship with the state's key witness. The defense also discovered that members of the jury had learned from news coverage that Sheehan had been tried and convicted before, and they had discussed these facts before and during their deliberations.

In light of the extraordinary manipulation of the jury selection process and the jury's exposure to the highly prejudicial extrinsic information regarding his prior conviction, Sheehan filed a Motion for New Trial.

At Sheehan's trial, the trial court asked the following questions and received the following answers from Trimbur:

> Q. Are *you* or any members of your family *or close friends employed by* the District Attorney's Office *or by the Sheriff's Office?*
>
> A. ***No sir.***

(Tr., Vol. 4, p. 918) (Emphasis supplied).

> Q. Is there any personal, business, family, or health reason that you know of why you could not serve as an impartial juror in this case?
>
> A. ***None that I know of.***

(Tr., Vol. 4, p. 919-20) (Emphasis supplied).

> Q. Alright then Rev. Trimbur the district attorney of Avoyelles Parish is Eddie Knoll. He just left here for a few minutes. He'll be back. The assistant district attorney for this trial is David Lafargue. The administrative assistant is Mr. Freeman Ford. Do you know any of these people?
>
> A. I know Eddie Knoll by name. But, I mean, I know him, but not,
>
> Q. You know him as the district attorney?
>
> A. Yes sir.
>
> Q. ***Have you ever had any dealings with him?***
>
> A. ***No sir.***

(Tr., Vol. 4, p. 917)

Additionally, Trimbur had led the Court and counsel to believe that he was merely a passing acquaintance of Detective Venable:

Q. Let me ask you some names and see if you know these folks.

A. Yes sir.

Q. Detective Robert Venable with the Sheriff's Office?

A. Yes sir.

Q. And how do you know Detective Venable?

A. I performed his wedding a year and a half ago.

Q. All right. And, did you have to – when I got married, I met with the preacher in advance, and he kind of counselled you and stuff, did you do any of that, or did you just do the ceremony?

A. I just did the ceremony.

Q. All right. Do you know his wife?

A. Yes, I did.

Q. Was she a member of your congregation, or he?

A. She was. That was in Evergreen.

Q. ***All right have you had any contact with him since that time?***

A. ***I saw him yesterday for a few minutes in the hall, and I asked him about his marriage.***

Q. Other than that?

A. ***No sir. Not really.***

(Tr., Vol. 4, p. 930) (Emphasis supplied).

The first hearing on the Motion for New Trial was held on June 28, 1988. (Tr., Vol. 7-8, pp. 1525-1653). Venable's hearing testimony revealed that he and his wife attended Trimbur's small congregation (Tr., Vol. 7, p. 1533); that they saw each other "numerous" times in 1986 (Tr., Vol. 7, pp. 1533-34); that Trimbur would just "drop by" and visit with Venable in the Detective's Office at the Sheriff's Office before the trial (Tr., Vol. 7, pp. 1535-36); that Venable's wife also worked for the Sheriff's Office, and was commissioned with Trimbur (Tr., Vol. 7, pp. 1538); that Venable had in fact assisted Trimbur in becoming an auxiliary deputy by making a recommendation to the Sheriff on his behalf (Tr., Vol. 7, pp. 1539-40); that, in 1987, through January 1988, Venable saw Trimbur at least once a month (Tr., Vol. 7, pp.

1540-41); Venable recalled seeing Trimbur at the Sheriff's Office before the trial, probably in his sheriff's deputy uniform, and remembered Trimbur being admitted through the locked back door after knocking because he had "every reason to be around there" and only police officers or employees of the District Attorney's office are allowed in this way (Tr., Vol. 7, p. 1541-1542); that Venable had visited in the Trimbur home at least half a dozen times before the trial; further, he had coffee with the Trimburs at their home two or three months before the hearing (just before Sheehan's trial) and he could just drop by to visit at any time (Tr., Vol. 7, p. 1543); Venable saw Trimbur at least three or four times between January 1988 and April 1988 to discuss Venable's marital problems (Tr., Vol. 7, p. 1545); and Venable was very comfortable confiding in Trimbur as a friend and as a pastor (Tr., Vol. 7, p. 1546).

Sergeant Malcolm LaBorde, a veteran with the Avoyelles Parish Sheriff's Office, also testified at the hearing. He told the court that he had personally been on patrol with Trimbur at least five or six times in 1987 (Tr., Vol. 7, pp. 1549-50); that he had seen Trimbur patrolling with many other deputies usually on the twelve hour evening shift (Tr., Vol. 7, p. 1550); that regular and auxiliary deputies wore the same uniforms; you could not tell the difference between the two (Tr., Vol. 7, p. 1550); Trimbur had ridden with him to make arrests and to check out complaints (Tr., Vol. 8, p. 1551); Trimbur received officer training; he knew how to book suspects, write reports, handcuff suspects, and he carries a gun on patrol (Tr., Vol. 8, p. 1551); Trimbur had to be qualified for fire arms training by the Alexandria Police Department, and had to re-qualify twice a year (Tr., Vol. 8, p. 1552); Trimbur was required to attend monthly training meetings at the Sheriff's Office (Tr., Vol. 8, p. 1553); and Trimbur was often at the Sheriff's Office even if he was not on duty (Tr., Vol. 8, p. 1555).

Deputy LaBorde also testified that he had asked Trimbur how he had managed to get on the Sheehan jury. He was curious because people working at the Sheriff's Office do not serve on juries. Deputy LaBorde stated that Trimbur told him that ***"somebody had asked him some questions, you know, if he was working with [the Sheriff's Office], and he said yes."*** (Tr., Vol. 8, pp. 1555-56).

Gano Bergeron, a captain with the Sheriff's Office, testified that he was responsible for training and dispatching all auxiliary deputies. (Tr., Vol. 8, p. 1598); that Trimbur was one of the more concerned deputies and he worked more than the required minimum 16 hours a month. (Tr., Vol. 8, p. 1599-1600). While he was in charge of training, Trimbur and the others received training in how to work car accidents, the law governing searches and seizures, how to secure crime scenes, and "shoot, don't shoot" firearm safety. (Tr., Vol. 8, p. 1600).

At the hearing, Trimbur was forced to admit he was commissioned as a reserve deputy in October of 1985 (Tr., Vol. 8, p. 1562), and that he kept his commission at home in a drawer; that he was required to wear a sheriff's deputy uniform and hat and the same badge as regular sheriff's deputies (Tr., Vol. 8, p. 1557); that he owned a gun which he only carried while on patrol, although when asked during *voir dire* whether he "used guns" he said he did not (Tr., Vol. 8, p. 1558; Vol. 4, p. 932); that he attended monthly training meetings at the Avoyelles Parish Sheriff's Office throughout 1986, 1987, and 1988 (Tr., Vol. 8, pp. 1560-61); that he rode around with various deputies on patrol, and while on patrol he and his partners had arrested suspects, transported them to jail, and interrogated them in jail (Tr., Vol. 8, p. 1559); that he was required to work at least eight hours every month in addition to his eight hours of monthly training to maintain his deputy position (Tr., Vol. 8, pp. 1562-63); and he admitted that he had been called up for duty during the Cuban inmate crisis at Oakdale, and was paid by the Sheriff's Office for guarding an inmate at Humana Hospital (Tr., Vol. 8, pp. 1563, 1590-91). All of this occurred while John Sheehan was a trustee in the tiny Avoyelles Parish Jail, where Trimbur and Venable worked.

After the hearing, the trial court denied the motion. Thereafter, Sheehan applied for writs to the Louisiana Supreme Court because of newly discovered evidence that Trimbur had contacted an attorney when he received his summons, seeking legal advice regarding his minister exemption and questions about the possible effect of his position with the Sheriff's Office on his ability to serve as a juror or to get out of service altogether.

In November of 1988, the Louisiana Supreme Court granted writs and remanded the case to the trial court with an order for a second evidentiary hearing. (App.9).

At the second hearing on the motion for new trial, Trimbur admitted that as soon as he received his jury summons he sought out the advice of a local attorney, Claire Sharpe, who attended his church. (Tr. Supplement, p. 24-25). He said he called Ms. Sharpe to see if he had to show up for jury duty since he had a minister exemption, but claimed he did not remember asking if his service as a deputy would prevent him from jury service. He testified that he called her because of his "busyness . . . I just wanted to not bother with it." (Tr. Supplement, p. 25-26). Ms. Sharpe advised him to call the judge. He said he did so, but he did not tell the judge he was a deputy. (Tr. Supplement, pp. 26-27)

Claire Sharpe testified that Trimbur called her and asked her if a minister was prohibited from serving on a jury:

> And I told him that I felt like it's not an automatic thing, that he can be exempted if he wanted to be. And he said – we talked a while and then **[Trimbur]** ***said something about, what about being an auxiliary deputy?*** And, I said, again, I think it's basically the same thing . . . ***And I said, well, if you're extremely worried about it, you can just tell them, when you're asked questions . . . I explained to him that he would be asked many questions by the defense and by the prosecution, concerning his relationships . . . I said, it's difficult for you to determine what's important because you're not an attorney; and I said, you needn't worry. If you're willing to serve, they'll ask you those questions and just answer them.***

(Tr. Supplement, pp. 35-36) (Emphasis supplied).

Ms. Sharpe stated that on at least two occasions she distinctly remembered Trimbur reflecting concern, interest, curiosity, and the like over the possible effect of his deputy status. At one point, he told her that it would probably be best for him to take his minister exemption, but she urged him to serve, suggesting to him that he would be a good juror. (Tr. Supplement, p. 36). *She further testified that she specifically advised Trimbur that the lawyers would know*

what to ask and for him to just make sure he completely and truthfully answered their questions. (Tr. Supplement, p. 37).

Ms. Sharpe testified that during her conversation with Trimbur he had even voiced concern about the possibility of a mistrial or multiple appeals if he decided to serve on the jury:

> Q. Now, do you remember why that term, "mistrial" or "appeal" came into the conversation? In what context was that used?
>
> A. Well, that would relate to what I just told Mr. Knoll concerning his being a minister and a deputy, if, for some reason, down the line, whether or not he's asked the question, that there would be repetitive appeals and possibly the word "mistrial;" I really don't remember, but we did talk about something like that.
>
> Q. As regards to his status as a minister and deputy?
>
> A. Yes.

(Tr. Supplement, p. 42).

At the prior hearing, Trimbur testified that "he was never asked" whether or not he was a reserve deputy, but would have admitted it, if specifically asked. (Exhibit A, Vol. 8, p. 1593). He also said that he did not recall the trial judge asking him if he worked for the Sheriff's Office, but stated that he had not told the judge that he was a deputy sheriff because he "felt" his involvement with the Sheriff Office was minimal and of no consequence. (Tr., Vol. 8, p. 1573).

The following exchange occurred during Trimbur's *voir dire* testimony:

> Q. Ok. Now, the other thing is, being in the city like you have, I'm curious, have you had any kind of – I don't want to say outrage or up-roar, but conflict about drinking in one of the neighboring towns, and teenage drinking; and Mr. Rabalais is involved in that. Are you – does that refresh your memory? Have you been to any meetings that Mr. Rabalais attended or you've attended, or Mr. Knoll's attended, on that issue?
>
> A. Yes.

Q. Tell me about that.

A. I went to see what was going to transpire in the way of exchange of dialogue with the gentleman representing out ABC Board Camp. Mr. Rabalais' connection with that has no bearing on me, Ok? I wouldn't – I don't portray myself with this word, "outrage." Ok?

Q. Well, I don't know what the right word is, Ok? I'm just looking for a word. . . . conflict . . .

A. ***I attended one meeting at the Concerned Parents for Better Avoyelles, if that's what you're referring to.***

Q. I don't know.

A. Yes sir, that, I think, is what you're referring to. Mr. Rabalais was present at that meeting; I know that.

Q. Ok, and what about Mr. Knoll?

A. Yes sir.

. . . .

Q. ***Ok, where is – what is your interest in that issue? You know, I can follow up and you can answer all the questions. And, does that come from just a personal interest as an individual, or is that through your representing the interest of your congregation, or of your religion or, you know, whatever?***

A. ***Through my church. . . . that was through personal interest as an individual.***

(Tr., Vol. 4, pp. 928-29) (Emphasis supplied).

At the hearing, however, Trimbur corrected his *voir dire* testimony. He stated that during the meeting at District Attorney Eddie Knoll's house approximately a month before Sheehan's trial, he ***"spoke up and said in that meeting . . . I said, I have a commission, I am a deputy, I have a uniform, if you ever need help in this parish, in this area, call me and I will see if I can work out a way to be of assistance to you."*** (Tr., Vol. 8, p. 1572). He did not ever mention this critical information during *voir dire*.

Trimbur testified that he did not think the fact that he assumed a law enforcement role at this meeting was important. Trimbur

testified that since the District Attorney prosecuting Sheehan knew he was a deputy, and he assumed Sheehan's counsel, Rodney Rabalias and Tucker Melancon (now a sitting federal district court judge), knew he was a deputy, he thought someone would bring it up ***"if it was of any consequence".*** (Tr., Vol. 8, p. 1573). This testimony prompted the following colloquy between defense counsel, Lewis Unglesby, and Trimbur:

> Q. Now, Rev. Trimbur, were you confused about the fact that I was interested in what happened, and what you were doing at that meeting?
>
> A. Yes.
>
> Q. You were? Well, why did you not think to volunteer that you had taken on the role at that meeting of a volunteer police officer who would help those in the community concerned about the drinking of under-aged children, and that you, yourself, are willing to report that to the deputies or the District Attorney, or whomever was the appropriate authority. Why didn't you tell me that?
>
> A. ***I absolutely didn't feel it had any consequence at all, in this trial.***

(Tr., Vol. 8, p. 1574). He did, however, admit that the trial court had told him and other potential jurors that there might be questions during *voir dire* that might not seem important or might even seem silly, but each juror needed to answer those questions honestly and completely to the best of his ability. (Tr., Vol. 8, p. 1575).

After the hearing, the trial court denied Sheehan's motion because in his mind there was an issue as to whether Trimbur was technically "employed" by the Sheriff's Office, since, although he was paid for guarding inmates, he was "only" a reserve deputy. While the judge admitted Trimbur's answer during *voir dire* was "arguably less than a full disclosure", he excused Trimbur's answer because "he did not intentionally mislead anyone." (Tr., Vol. 8, p. 1657). The judge further reasoned that the only way the defense could show bias was to show, in the abstract, that law enforcement personnel are prosecution oriented, since Trimbur claimed that he had no prior knowledge of the case. (Tr., p. 1657). Further, the judge found Trimbur had not "intentionally misled" the defense about his friendship with Venable, stating the attorneys should have

asked more questions about it to unearth this information. (Tr., pp. 1661-2).

Following the second hearing on the motion, the trial court again denied the motion. (Tr. Supplement, p. 43).

III. Action of the District Court and Court of Appeals.

Following the exhaustion of his state court remedies, John Sheehan filed a petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 on December 8, 1994. By memorandum order dated February 1, 1995, the state was ordered to answer the petition and submit the entire state court record with the court. On May 15, 1995, the District Court referred the petition to Magistrate Judge Simon for his report and recommendation. (App.2).

After thorough briefing of the issues, the Magistrate Judge issued his written recommendation that the writ of *habeas corpus* be granted because John Sheehan's Sixth Amendment right to a fair trial before an impartial jury was violated. (App.3).

After an exhaustive review of the record, the Magistrate Judge found that ***"Trimbur's testimony was riddled with inconsistencies."*** (App.3, p.9). The Magistrate found proven evidence of actual bias under *McDonough Power Equipment, Inc. v. Greenwood*, 104 S.Ct. 845 (1984), as well as, implied bias:

> The facts and circumstances of this case, taken as a whole, show that Trimbur deliberately concealed his employment with the Sheriff's Office because he wanted to be on the jury; in fact, he was the jury foreman. Trimbur was asked to state his employment with the Sheriff's Office and did not do so because he 'did not think it was important'. Trimbur did not take his minister's exemption because 'he wanted to serve on this jury'. Whether or not Trimbur believed his job as an auxiliary deputy would not influence his judgment as a juror, and through him, the other jurors, is irrelevant; that was not his decision to make. See *Scott*, 854 F.2d at 699 (juror's conscious censoring of the information that his brother was a deputy sheriff created a strong inference that he wanted to serve on the jury and thought it unlikely that the court or defense counsel would permit him to do so).

While fully cognizant of the presumption of correctness, the Magistrate further ruled:

> However, in the instant case, the trial judge made no finding as to whether the circumstances indicated that Trimbur was biased; he only found that a deputy sheriff was not disqualified from serving as a juror because he could not be considered biased *per se* which is actually an erroneous statement of the law. ***An inference of bias was created by Trimbur's conscious censoring of the information that he was an auxiliary Deputy Sheriff and that he was friends with Detective Venable; but, as an active auxiliary deputy sheriff, he was considered to be biased as a matter of law.*** (App.3, p.15)

On November 27, 1995, after a full review of the record, the District Court entered judgment granting Sheehan a conditional writ of *habeas corpus*. The state appealed claiming the District Court erred in every respect. The Court of Appeal reversed, ruling that "the lower courts failed to defer properly to the state court findings of fact". (App.1, p.2).

SUMMARY OF THE ARGUMENT

The fundamental issue raised by these proceedings is whether any juror, who neglects, conceals, or fails to disclose the fact that he is an actively commissioned, badge-wearing, gun carrying reserve deputy sheriff with the very agency responsible for investigating and charging petitioner and a friend of the lead detective, can ever be considered a fair juror, despite his post-trial protestations of impartiality, and the trial judge's blind acceptance of his claimed freedom from bias. Particularly where, the objective, undisputable evidence shows that he was so concerned about the effect of his deputy status on the possibility of getting out of jury service that he sought out the advice of a local attorney before he ever walked through the courthouse doors and discovered that he had the opportunity to participate in the most sensationalized murder case in the history of his small, rural community.

It is petitioner's contention that, given the proven, objective reality presented by the evidentiary record, it is impossible as a matter of law, for such a juror to be impartial, and that the trial judge's finding that the foreman sincerely believed he could be

impartial despite these undisclosed relationships to the prosecuting agency flies in the face of all logic, psychology, and human experience.

This Court should finally and squarely address the question of whether implied bias is a pure question of law or a mixed question of law and fact beyond the reach of the presumption of correctness. The Court should correct the resulting split of authority among the circuits on this issue.

The First, Seventh, Ninth, Tenth, and Eleventh Circuits have ruled that implied bias, as opposed to actual or admitted bias, is a question of law beyond the reach of the presumption of correctness whereas the Fifth Circuit below applied the presumption to this purely legal issue, or at a minimum, this mixed question of law and fact.

The lead detective was the state's key police witness against John Sheehan. He was a very important witness. He testified that he took photos of the alleged crime scene, but that the film was destroyed because he left the camera in the sun. The jury had to test Venable's credibility. Trimbur and Venable had coffee together in Trimbur's home some time just before the trial and discussed the detective's marital problems. Trimbur could not impartially judge this case in light of his relationships and natural allegiances to the Sheriff's Department and the detective who had helped him get his commission. Trimbur got the job because his friend, Venable, recommended him to the Sheriff.

Trimbur had even called an attorney after receiving his jury summons, seeking advice. His attorney testified they he had mentioned his relationship with the sheriff's office *and* raised concerns about the effect of this relationship upon his ability to sit on this jury and the possibility of a mistrial or repeated appeals. His attorney told him to tell the trial court and the attorneys involved if he was extremely worried about it, and to just answer the questions honestly and completely. He did not.

Trimbur wore the same uniform, badge, and hat as full time deputies. He carried a gun on patrol and had to qualify and requalify twice a year to carry his weapon although when asked in *voir dire* if he "used guns" he said: "No." At every turn, information which could have lead to the discovery of his being a deputy was suppressed.

Had Trimbur honestly answered the direct questions put to him, the defense would have had a valid basis to challenge him for cause under well settled Louisiana law. A reserve deputy sheriff is too likely to be influenced as a juror by that association and should be disqualified from jury service. Accordingly, he was denied the right to a fair trial before an impartial jury under *McDonough*, and regardless of whether the pre- or post-AEDPA standard is employed, petitioner proved by clear and convincing evidence that the state court findings on the issue of actual bias were incorrect. Moreover, the District Court was correct in granting John Sheehan the *habeas* relief required by the United States Constitution under the implied bias doctrine. The District Court's resolution of this purely legal or mixed question of law and fact is not subject to the presumption of correctness.

REASONS FOR GRANTING THE WRIT

An accused's right to be tried by an impartial jury of his peers is one of the hallmarks of our constitutional heritage. The Sixth Amendment commands that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . " U.S. Const. amend. VI. Every member of any jury must be "capable and willing to decide the case solely on the evidence before it. . . . " *Smith v. Phillips*, 102 S.Ct. 940, 946 (1982). The *voir dire* process protects this inviolate principle "by exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough Power Equipment, Inc. v. Greenwood*, 104 S.Ct. 845, 849 (1984).

As the Court noted in *McDonough*:

> Demonstrated bias in the responses to questions on *voir dire* may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. ***The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.***

McDonough, 104 S.Ct. at 849. This critically important process of rooting out biased jurors is thwarted, however, when jurors

fail to honestly and completely answer the questions put to them during the *voir dire* examination.

The authority to accept jurors for service is vested by law in the court and counsel. By withholding information, prospective jurors effectively usurp this critical decision-making authority. When this occurs, the verdict is infected by bias and constitutionally unreliable. The opportunity for prejudice to the accused is obvious. Justice O'Connor aptly observed these difficulties in *Smith v. Phillips*, 102 S.Ct. 940, 948 (1982):

> Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may be unaware of it. The problem may be compounded when a charge of bias arises from a charge of juror misconduct. . . . ***Whether or not the state proceedings result in a finding of "no bias," the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances [where bias is implied].***

As the District Court properly held below, that is what precisely happened in this case.

Given the extreme facts of this case, it is impossible as a matter of law, for such a jury foreman to be considered impartial. The trial judge's apologia for Trimbur's inexcusable failure to fully and frankly answer direct questions flies in the face of all logic, psychology, and human experience. Without question, one biased juror destroys the integrity of any verdict.

Given the natural, and often subconscious, human propensity for self-justification, it is difficult, at best, if not impossible to learn from a juror's own testimony whether he was in fact impartial. In the instant case, it would be virtually impossible to expect that any juror, in Trimbur's position, could admit that his undisclosed law enforcement history had indeed affected or influenced his verdict and behavior as foreman. Nearly 200 years ago, Chief Justice Marshall, in words particularly appropriate to this case, stated that a person "may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar

situation would feel prejudice." *United States v. Burr*, 25 Fed. Cas. at p. 50, No. 14692 g. (C.C. Va. 1807). Only cynics or sophists could possibly declare – much less believe – that the foreman in this case would not be subject to "a possible temptation . . . not to hold the balance nice, clear, and true between the state and the accused . . . " *Tumey v. State of Ohio*, 273 U.S. 520, 532 (1927). Undoubtedly, the extreme nature of this case is precisely the kind Justice O'Connor had in mind in *Smith v. Phillips*, *supra*.

I. THE FIFTH CIRCUIT'S APPLICATION OF THE PRESUMPTION OF CORRECTNESS TO A QUESTION OF LAW IS IN CONFLICT WITH SEVERAL DECISIONS OF OTHER COURTS OF APPEALS NECESSITATING CORRECTION AND CLEAR GUIDANCE FROM THIS COURT.

The decision of the Fifth Circuit has created a dangerous split of authority among various circuit courts of appeal regarding the application of the presumption of correctness to the legal question of implied or presumptive juror bias. The Fifth Circuit below decided that the doctrine of implied bias is a question of fact not law; and therefore, governed by the presumption of correctness. In doing so, the court reversed the District Court's finding that John Sheehan was entitled to independent federal review of his constitutional challenges. The First, Seventh, Ninth, Tenth, and Eleventh Circuits have ruled that implied bias is a question of law beyond the reach of the presumption of correctness.

In *Gonzales v. Thomas*, 99 F.3d 978 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 1342 (1997), the Tenth Circuit ruled in a state prisoner's *habeas* case that whether implied bias exists in a juror is a legal determination that turns on an objective evaluation of the challenged juror's background and relation to the case being tried. Drawing on Justice O'Connor's concurrence in *Smith v. Phillips*, *supra*, the court noted that such extreme circumstances requiring a finding of implied bias which might include a revelation that the juror is an employee of the prosecuting agency like we have as in this case. The court further noted:

> Thus, juror bias may be found even though a juror denies any partiality. A finding of implied bias in the face of a juror's denials is not, however, tantamount to a finding that the juror has lied. As Justice O'Connor has observed, '[d]etermining whether a juror is biased or has prejudged the case is difficult, partly because the juror may be unaware of it.' Though a juror might honestly believe she can be impartial, she nevertheless may have 'such a close connection to the circumstances at hand that bias must be presumed'.

Gonzales, 99 F.3d at 987 (Citations omitted).

Likewise, in another state prisoner *habeas* case, the Tenth Circuit affirmed the district court's ruling that a woman convicted for the first degree murder of her spouse was entitled to a new trial in light of a juror's dishonest responses to *voir dire* questioning regarding intra-family abuse. The court held that whether a juror's bias may be implied from circumstances is a question of law. Any doubts regarding bias must be resolved against the juror, and a juror's dishonesty, of itself, was evidence of juror's bias. *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991).

In another state prisoner *habeas* action, the Seventh Circuit in *Hunley v. Godinez*, 975 F.2d 316 (7th Cir. 1992) (*per curiam*), the Seventh Circuit rejected the state's contention that the district court erroneously invoked the doctrine of implied bias in order to evade the presumption of correctness. While noting that this Court has held that actual bias is a question of fact entitled to deference on review, this Court " 'has never precluded the use of the conclusive presumption of bias' in 'extreme' or 'extraordinary cases,' " citing Justice O'Connor's concurring opinion in *Smith*. *Hunley*, 975 F.2d at 318. Accordingly, the court succinctly held that whether a juror's partiality may be presumed from the circumstances is a question of law beyond the reach of the presumption of correctness. *Hunley*, 975 F.2d at 318-319.

The Ninth Circuit in *Tinsley v. Borg*, 895 F.2d 520 (9th Cir. 1990), involved a claim of implied bias rejected by the district court. The court clearly would not have been deterred

by the presumption of correctness had there been evidence of a "personal connection" between the challenged juror and the litigation as was presented in *United States v. Allsup*, 566 F.2d 68 (9th Cir. 1977). The court concluded that the circumstances did not warrant a presumption of bias:

> Neither juror Smith herself nor a close relative had been a rape victim or rapist. There was no personal connection between Smith and the defendant, the victim, or any other witness. Smith had no prejudicial information about the defendant himself. This situation differs significantly from that presented in *Allsup*. In *Allsup*, the jurors in question worked for the very bank which had been robbed . . . Not only was there this employment relationship, but as bank employees they had a well-founded, 'reasonable apprehension of violence' by offenders such as the defendant because 'violence, or the threat of violence, is a frequent concomitant of the offense' of bank robbery . . . ***This combination added up to presumed bias.***

Tinsley, 895 F.2d at 529 (Emphasis supplied).

The First Circuit in *Amirault v. Fair*, 968 F.2d 1404 (1st Cir. 1992), noted that state court findings on claims of actual bias are presumed correct under 28 U.S.C.A. 2254(d). Nonetheless, the court further noted

> Although we read the majority vote in *McDonough Power Equipment v. Greenwood* . . . to require a further determination on the question of juror bias even where a juror is found to have been honest, we find that bias should not be implied here. As the federal district court observed, the situation presented here of a juror found to have locked the memory of an unrelated forty-year old rape does not rise to the level of 'exceptional' or 'extreme' circumstances which may permit a finding of implied bias.

Amirault, 968 F.2d at 1405-1496 (Citations omitted).

Although the full Court has yet to squarely decide the issue and clear guidance is needed from the Court, the analysis

should be no less than that employed in *Thompson v. Koehane*, 116 S.Ct. 457 (1997). There, Justice Ginsburg, writing for a solid majority, held that a state court decision as to whether a suspect is "in custody" for purposes of *Miranda* is not entitled to the statutory presumption of correctness, but is a mixed question of law and fact warranting independent federal *habeas* review. "What happened" issues of historical fact warrant the presumption of correctness, but the "ultimate question" – Was the foreman on John's jury presumptively biased under the totality of the circumstances? – falls outside of § 2254(d)'s domain because of its "uniquely legal dimension" requiring the court to apply an objective test to resolve "the ultimate inquiry". *Thompson*, 116 S.Ct. at 465. At a minimum, implied juror bias must by necessity present a mixed question of law and fact. Otherwise the doctrine would have little efficacy and vitality in egregious situations like the one at bar.

II. THE SIXTH AND FOURTEENTH AMENDMENTS DO NOT PERMIT AN INNOCENT MAN TO BE CONDEMNED TO LIFE IN PRISON BASED ON A CONVICTION ORCHESTRATED AND INFECTED BY A PRESUMPTIVELY BIASED JURY FOREMAN.

The foreman of John Sheehan's jury deliberately denied the fact that he was a reserve criminal sheriff's deputy. This was critically important information because this office was the very agency that investigated the death of John's wife. He also decided to consciously censor any information, like gun use, which could have led the defense to the truth about his connection with the investigating and prosecuting agencies involved. Even though he was directly asked to reveal this sort of information, he chose not to do so. Further compounding the problem, when he was asked whether he knew a Detective Venable, Trimbur's answers led the court and the defense to believe he was merely an acquaintance of Detective Venable. In fact, he was the close personal friend, confidante, and spiritual counsellor to Venable – the very detective who was vigorously challenged at trial for his mishandling of critical evidence and credibility problems. Once on the jury, a juror

who denied, concealed, and consciously censored critical information about his relationship with both the Sheriff's Office and the state's key police witness became its foreman and led the jury to convict John Sheehan. This is presumptive bias in itself, requiring *habeas* relief.

Even giving the foreman every benefit of the doubt, the circumstances point so sharply to bias that even his own denials of partiality must be discounted. *United States v. Nell*, 526 F.2d 1223, 1229 n. 8 (5th Cir. 1976). He may to this day sincerely believe that his undisclosed law enforcement relationships would not taint his judgment, but that is why Justice O'Connor's observations in *Smith* are so critical:

> ***Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.***

Smith, 102 S.Ct. at 948.

In *United States v. Scott*, 854 F.2d 697 (5th Cir. 1988), the Fifth Circuit ruled that prospective jurors cannot be permitted to censor material information during *voir dire* examination. In *Scott*, the issue of juror bias arose when it was discovered that the foreman of the jury failed to disclose the fact that his brother was a deputy sheriff in the Jefferson Parish Sheriff's Office. Scott moved for a new trial.

At the hearing, the foreman admitted his brother was a deputy sheriff, but attempted to justify his actions by stating that he had not furnished the information because he did not think that it would affect his judgment in the case. *Scott*, 854 F.2d at 698. The trial court found that his failure to disclose this relationship was "unreasonable". Nevertheless, the trial court excused his breach of faith because in the court's opinion the foreman "sincerely" believed that his brother's position would not affect his impartiality as a juror.

On appeal, the Fifth Circuit pointed out that "sincerity" is not the proper constitutional test. There, the court held that the constitution required a new trial due to implied bias: "The dispute here, as the trial court and [the government] couched it, is whether [the foreman] "failed to answer *honestly*. At bottom, however, the issue is whether [the foreman] was biased

because of his relationship with his brother." *Scott*, 854 F.2d at 699. Further, this Court pointed out:

> The district court found that [the foreman] was "sincere". ***That is an insufficient basis for the court to accept [the foreman] as a juror. A finding of "sincerity" is not the same as a finding that the juror was unbiased.*** A juror may not conceal material facts disqualifying him simply because he *sincerely* believes that he can be fair in spite of them.

Continuing, the *Scott* court recognized the tension, if not the contradiction, inherent in the trial court's findings. On the one hand, the court found his failure to respond "unreasonable", and on the other, excusable given his "sincere" belief that he could be an impartial juror. The court found that the foreman "consciously censored" his relationship to law enforcement, noting there was a strong inference that he wanted to serve on the jury because he "believed it was *his* place, and not the place of the court or defense counsel, to determine whether his relations were a bar to jury service in this case."

The court concluded its ruling, saying:

> [The foreman] was hostile to what he correctly perceived to be the interests of the defense and the court. ***This in itself constitutes bias.*** As other circuits have recognized, "[c]ertainly, when possible non-objectivity is secreted and compounded by the untruthfulness of a potential juror's answer on *voir dire*, the result is a deprivation of the defendant's right to a fail trial."

Scott, 854 F.2d at 699-700, citing *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984), quoting *United States v. Bynum*, 634 F.2d 768, 771 (4th Cir. 1980).

Scott should have decided this case. The only real difference between *Scott* and the case at bar is that the jury foreman in *Scott* hid the fact that *his brother* was a deputy sheriff. Here, the jury foreman in John's trial concealed not only the fact that *he* was a deputy, but also that he was the social friend of the prosecution's star witness. One's relationship to law enforcement or persons in law enforcement are "challenge for cause" questions; their implications for potential juror bias have been

recognized for centuries in Anglo-American jurisdictions. See generally, *Crawford v. United States,* 29 S.Ct. 260 (1909).

The questions put to Trimbur demanded complete and honest answers. The trial judge in his instructions had told Trimbur that candor was required. He decided not to comply with the rule of law. His "sincere" belief that he was not biased is objectively unreasonable as the Magistrate and District Court judges found.

Had Trimbur disclosed his relationships with the Sheriff's Office and Detective Venable he would never have been allowed to sit on this jury. Clear Louisiana jurisprudence at the time of John's trial supported challenging Trimbur for cause had the defense known of his law enforcement relationships. An active or reserve police officer at the time of trial is too likely to be influenced as a juror by that association and should be disqualified from the jury. In *State v. Simmons*, 390 So.2d 1317, 1318 (La. 1980), the Louisiana Supreme Court held: " . . . an actively employed criminal deputy sheriff is not a competent criminal juror. Any jurisprudence to the contrary is expressly overruled." In *State v. Mitchell*, 475 So.2d 61 (La. App. 2nd Cir. 1985), the court held:

> [O]ur review of the extensive Supreme Court jurisprudence on the issue of jury service by one ***associated with law enforcement activities*** causes us to determine that the trial court erred in failing to sustain the challenges for cause by the defendants to this juror. ***We conclude that our Supreme Court has deemed that one serving in the capacity as an active or reserve peace officer, such as a deputy sheriff or police officer, is too likely to be influenced as a juror by that association and should be disqualified from jury service.***

Mitchell, 475 So.2d at 65.

Trimbur's inconsistent explanations of why he failed to answer raise alarming questions about his actual bias and personal motivations. His "explanations" are so riddled with inconsistencies that it is difficult to ascertain what his actual testimony is at times. The Magistrate Judge and District Court agreed.

Trimbur admitted he attended a meeting of a civic group called "Concerned Parents for a Better Avoyelles" at the District Attorney's home just weeks before Sheehan's trial. Trimbur stated that, at this meeting he ***"spoke up and said in that meeting . . . I said, I have a commission, I am a deputy, I have a uniform, if you ever need help in this parish, in this area, call me and I will see if I can work out a way to be of assistance to you."*** (Tr., Vol. 8, p. 1572). He attempted to justify his failure to disclose this information during jury selection, saying he thought someone would bring it up ***"if it was of any consequence".*** (Tr., Vol. 8, p. 1573). Even if he "sincerely" believed it was not important, and even if he "sincerely" believed his law enforcement relationships would not influence his judgment, and, through him, the other jurors, his beliefs are irrelevant. It was not his decision to make. It was the duty of counsel and the trial court to do so. As in *Scott*, this creates a strong inference that he wanted to serve on the jury and thought it unlikely that the court or defense counsel would permit him to do so.

When pressed to explain this obvious omission he claimed he was confused by the questions about the meeting and did not think it was important:

> Q. Now, Rev. Trimbur, were you confused about the fact that I was interested in what happened, and what you were doing at that meeting?
>
> A. Yes.
>
> Q. You were? ***Well, why did you not think to volunteer that you had taken on the role at that meeting of a volunteer police officer who would help those in the community concerned about the drinking of under-aged children, and that you, yourself, are willing to report that to the deputies or the District Attorney, or whomever was the appropriate authority. Why didn't you tell me that?***
>
> A. ***I absolutely didn't feel it had any consequence at all, in this trial.***

(Tr., Vol. 8, p. 1574). It just was not his job to decide if this was important information.

Again and again inconsistencies arise. On June 28, 1988, he said he just didn't feel this information was important enough to bring up. But we know that he called an attorney, who testified that Trimbur was very concerned about the issue of his deputy status. She said she told him that if he was "extremely worried about it" he should just tell the court or the attorneys. Why he chose to ignore her advice is unclear, but the fact that he consciously did so and decided to hide this fact is uncontroverted.

Other aspects of Trimbur's attorney's testimony are particularly alarming. Revealing Trimbur's prescience, she said he voiced real concern that his service might provoke a mistrial or repetitive appeals. Why? This was on his mind before Trimbur ever shows up at the courthouse, before he knows that he would be a member of the jury venire for Sheehan's highly publicized trial. Is this not an admission of bias – to think he might have caused a mistrial or repetitive appeals?

Trimbur testified that he wanted to avoid jury service altogether – that he wanted to "get it off his calendar", and did not want to be bothered with it (Tr. Supplement, p. 25) He even called the trial judge to see if he even had to show up at the courthouse to claim his statutory exemption.

When asked during *voir dire* why he had not exercised his exemption, he said: "Because I'm not just a member or servant of my church; I'm a member of my community; and I feel strongly an obligation in my community." (Tr., Vol. 4, p. 925). Contrast that with his testimony during the second hearing, where he testified "I didn't want to serve on the jury. I draw a distinction between wanting to serve and being willing to serve." (Tr. Supplement, p. 28). Contrast that with his explanation of why he had not claimed his exemption after he had gone to the trouble of seeking legal advice regarding his status as a minister *and* a deputy sheriff and his call to the judge to make sure he had an exemption: "I saw no reason to claim it. I was asking whether I would even have to bother coming in." (Tr., Vol. 8, p. 26).

Trimbur came to court to exercise his automatic exemption, but ended up sitting through two long days of *voir dire*, and a week long trial. What sparked his sudden interest? He

was the last juror chosen. He had heard the questions asked of the other jurors over and over. He had plenty of time to reflect upon his status and relationships, and to decide how he planned to respond when his turn came up. Nonetheless, Trimbur testified that his only contact with Venable in a year and a half was in the hall of the courthouse on the first day of jury service. (Tr., Vol. 4, p. 930). Unless Venable was not telling the truth, we know that this is not true. Venable testified that he had been in Trimbur's home several times and was probably there during March and April 1988. (Tr., Vol. 8, p. 1545). The trial was held the last week of April 1988.

Although Trimbur offered several inconsistent stories about why he did not disclose he was a reserve deputy and tried to minimize his role in his work for the Sheriff's Office, he never attempted to explain why he concealed the true nature of his relationship with Detective Venable. This was critically important information. The defense in this case was that the shooting was accidental. The direct evidence indicated that it was accidental, and the coroner initially ruled it accidental.

The case against John Sheehan was totally circumstantial, and the state relied heavily on Venable's testimony. Critical elements of the so-called crime scene changed between the moment of the incident and the time the coroner's office photographed the scene because Venable, the first officer to arrive, failed to preserve the scene. He failed to seize the shotgun shells out of the gun for fingerprint analysis which he even conceded could have proven that John did not load the gun and further prove his innocence! (Tr. pp. 1339-41). It was Venable who testified from memory alone as to what he remembered where, what "evidence" was found where, what Sheehan allegedly told him, and as to what the physical evidence involved because all of the photographs Venable took of the scene were "lost" after he somehow allowed them to be exposed to sunlight.

Other critical pieces of physical evidence like the shirt John's wife was wearing were also lost. The shirt could have been aligned to the exit wounds to further corroborate John's statement of how this tragedy occurred and to disprove the prosecution's "pellet path" arguments.

John's freedom or conviction rested almost solely on Venable's credibility; the jurors had to test his credibility. Only impartial jurors could have done so. As the record so thoroughly demonstrates, given Trimbur's undisclosed relationships and natural allegiances, he was certainly not fit to do so. As the District Court held, the trial court's blanket acceptance of Trimbur's protestations of "sincerity" simply cannot be accepted at face value. The trial court's rulings are entitled to no deference from any court. It would be asking far too much of human nature to expect anyone in Trimbur's position to admit his undisclosed connections affected his verdict or behavior. What person can be expected to admit that he had violated his oath to tell the truth, his oath to be an impartial juror and, in essence, admit he committed a crime, or at least, a serious breach of faith? This is why Chief Justice Marshall concluded so many years ago that:

> [I]n determining whether a prospective juror should be excluded on this ground [implied bias] his statements upon *voir dire* are totally irrelevant; a person 'may declare that he feels no prejudice in the case; and yet the law cautiously excludes him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice,' *United States v. Burr*, 25 Fed. Cas. at 50."

United States v. Haynes, 398 F.2d 980, 984 (2nd Cir. 1968).

It is axiomatic that such jurors could hardly be expected to afford a criminal defendant "the right to . . . trial, by an impartial jury," as guaranteed by the Sixth Amendment. Otherwise, if state court judges can hide behind the presumption of correctness with a finding of "no bias" the constitutional guarantee of an impartial jury would truly become a hollow pledge.

The record makes Deputy Malcolm LaBorde's testimony all the more telling and alarming. Sergeant LaBorde testified that he had asked Trimbur how he had managed to get on the Sheehan jury. He was curious because people working at the Sheriff's Office do not serve on juries. Deputy LaBorde testified that Trimbur told him that ***"somebody had asked him***

some questions, you know, if he was working with [the Sheriff's Office], and he said yes." (Tr., Vol. 8, pp. 1555-56).

We do not know the precise reasons why Trimbur chose to conceal his relationships. Nor do we know what prompted the dramatic change of heart in Trimbur's willingness to serve on this jury. But, given the human considerations at play here and the applicable case law, we do know that John Sheehan did not end up with a fair, unbiased, impartial juror.

As the Court noted in *Swain v. Alabama*, 85 S.Ct. 824, 835 (1965) (citations omitted):

> The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury . . . the challenge is "one of the most important rights secured to the accused . . . The denial or impairment of the right is reversible error without a showing of prejudice . . . "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they trust the case will decide on the basis of the evidence placed before them, and not otherwise.

Trimbur would have *never* served on John's jury had he answered the questions put to him honestly. Petitioner would have invariably exercised his remaining peremptory challenge to remove Trimbur from the panel if this information had been revealed.

The very purpose of *voir dire* was destroyed by Trimbur's actions. He ignored the trial court's instructions to answer all questions completely and truthfully. He ignored his attorney's advice to answer all questions completely and truthfully. Trimbur "believed it was *his* place, and not the place of the court or defense counsel to determine whether his relations were a bar to jury service in this case." *Scott*, 854 F.2d at 699. Trimbur was hostile to what he correctly perceived to be the natural concerns of the defense and the court.

As the court said in *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976): "The jury box is a holy place. To ensure that those who enter are purged of prejudice, both challenges for cause and the full complement of peremptory challenges are crucial." The Magistrate Judge and the District Court properly ruled that Trimbur was presumptively biased. Trimbur, although a man of the cloth, was not fit to enter the holy place and pass judgment upon John Sheehan.

CONCLUSION

The jury sitting in judgment of John Sheehan's guilt or innocence was infected by the presence of a presumptively biased foreman. The evidentiary record speaks for itself. These are fundamental constitutional violations going to the heart of the Sixth Amendment's guarantee that all persons are entitled to a fair trial before an impartial jury based solely on admissible evidence introduced at trial. This constitutional defect warrants a new trial, and cries out for *habeas* relief. The District Court properly granted the writ. John has already spent over 10 years in prison without ever receiving a fair trial.

Accordingly, John Sheehan, prays that this Honorable Court issue a writ of certiorari to review the judgment of the Court of Appeals' reversal of the District Court's order of *habeas* relief.

Respectfully submitted,

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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30008

JOHN ANTHONY SHEEHAN

Petitioner - Appellee

v.

JOHN P WHITLEY, Warden, Louisiana State Penitentiary;
RICHARD P IEYOUB, Attorney General, State of Louisiana

Respondents - Appellants

Appeal from the United States District Court
for the Western District of Louisiana
(94-CV-2249-A)

(Filed March 11, 1997)

Before JONES, DUHÉ, and EMILIO M. GARZA, Circuit Judges

EDITH H. JONES, Circuit Judge:*

Appellee John Anthony Sheehan was convicted of second degree murder and sentenced to life imprisonment without benefit of parole for killing his wife, Monica Jeansonne Sheehan in 1986. After his conviction

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* Pursuant o [sic] Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

was affirmed on direct and collateral review in the state courts, Sheehan sought a writ of habeas corpus in federal court. The district court referred the matter to a magistrate judge, who recommended granting the writ based on Sheehan's claims that he was denied a fair trial before an impartial jury. The district court adopted the magistrate judge's recommendation and ordered the state to release Sheehan if he was not retried within sixty days. Pending appeal, the order was stayed. We conclude that the lower courts failed to defer properly to the state court findings of fact. With that error corrected, there was no basis for issuance of the writ. Accordingly, we reverse and render judgment that relief be denied to appellee.

I. BACKGROUND

Monica Sheehan was killed in April 1986 when her husband fired a 12-gauge pump shotgun into her chest. Sheehan admitted that he was holding the shotgun when it fired, but he contended at trial that he was merely cleaning the gun and the shooting was accidental. Two Louisiana juries disagreed, and appellee was twice found guilty of second degree murder. The Louisiana appellate court reversed Sheehan's first conviction, finding that a statement by appellee had been introduced against him in violation of the constitution. *State v. Sheehan*, 515 So.2d 670 (La. App. 3d Cir. 1987), *writ den.*, 519 So.2d 129 (La. 1988). Appellee's second trial led to the confinement of which he now complains.

At that trial, Michelle Bordelon testified that after an argument in December 1984, Sheehan "told her that he didn't love her [Monica Sheehan], and didn't know why

he married her, and wish [sic] he would have never married her." Exhibit A, Trial Transcript ("Exh. A") at 1178. Ms. Bordelon also testified that Sheehan abused Monica, forcing her to visit the emergency room. *Id.* at 1176-79. Monica's father testified that the marriage was troubled and recounted a phone call from Monica in which he overheard Sheehan threaten to kill her.[1] *Id.* at 1196. Monica's mother also testified to marital difficulties between Sheehan and Monica. *Id.* at 1209-11. Monica's step-father testified that Sheehan talked to him in July or August of 1985 about marital difficulties, indicating that he wanted out of the marriage.[2] *Id.* at 1220-21.

The state also introduced a $50,000 John Hancock insurance policy on Monica's life purchased on April 17, 1986, thirteen days before she died. The agent, Thomas McCullom, testified that Sheehan already had a policy on Monica's life dating from 1984 in the amount of $25,000, and the increase in insurance coverage ordered by Sheehan was unsolicited. The John Hancock application indicated that appellee did not contemplate acquiring any other insurance on Monica's life. Appellee made the policy effective immediately by delivering a military allotment to Mr. McCullom.

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[1] "Anthony Sheehan was hollering over the phone that if you tell your daddy anything about what's going on over here, I'm going to kill you; and if he comes down over here, I'm going to fight with him and I'm going to kick him on his bad leg." *Id.* at 1196.

[2] "Well, I asked him [Anthony Sheehan] what their problem was, and he told me that he just didn't love her; that he thought he did, but he didn't. And that he would do anything that it took to get her out of his life." *Id.* at 1221.

On April 23, just seven days before Monica's death, Sheehan initiated steps to secure an additional $75,000 insurance policy covering Monica's life. The State Farm representative, Phyllis Heser, testified that appellee arrived at her office on April 24 without Monica, despite Mrs. Hester's admonition that Monica's signature would be necessary. *Id.* at 1057. Mrs. Hester sent the policy, complete except for blanks requiring Monica's signature, home with Sheehan. When Sheehan returned the policy early the next morning, the space contained Monica's purported signature.[3] *Id.* at 1059. To make the policy effective immediately, Sheehan paid premiums for two months in cash and returned to pick up the signed binder that day, instead of accepting Mrs. Hester's offer to mail the binder once the agent had signed it. *Id.* at 1063-64. The parties stipulated that the state's handwriting expert would testify that the signature purporting to be Monica's on the State Farm policy application was actually Sheehan's forgery. *Id.* at 1252.

When the shooting occurred, Monica was sitting on the floor in front of her husband playing a game. He was sitting in a chair and allegedly began to clean a 12 gauge pump shotgun with an oily rag when the gun fired. Monica was shot in the chest. The doctor who performed the autopsy on Monica's body testified that appellee's

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[3] "Mr. Sheehan arrived at our office the next morning, on the 25th, very early. Our office opens – we work at 8:00, but we don't open to the public until 8:30. And he was sitting in the parking lot when we unlocked the doors." Exh. A at 1059.

explanation that the shooting was accidental was inconsistent with Monica's injuries and the trajectories of the buckshot. *Id.* at 1108-1128.

Detective Robert Venable testified that three unspent shotgun shells were found – two on the floor and one in the chamber of the shot gun. *Id.* at 1325-26. A nurse who arrived at the scene soon after the shooting testified that two unspent shells and a spent shotgun shell were lying on the floor near Monica's body. Detective Venable did not find a spent shell on the floor but found a spent shell in the chamber of the shotgun.

The jury, by a 10-2 vote, found Sheehan guilty of second degree murder. Appellee subsequently filed a motion for new trial on the grounds that David Trimbur, the jury foreman, had concealed his position as an auxiliary sheriff and his relationship with Detective Venable. Appellee also alleged that members of the jury had learned of his prior conviction on this charge. After an evidentiary hearing, the trial judge denied the motion for new trial. Appellee obtained a writ from the Louisiana Supreme Court ordering the trial court to reopen the hearing on the motion for new trial on the grounds that appellee had newly discovered evidence. On remand, the trial court heard the new evidence and again denied the motion for new trial. This time, appeals were unsuccessful. *State v. Sheehan*, 558 So.2d 758 (La. App.3d Cir. 1990).

Sheehan filed this petition for writ of habeas corpus, alleging a denial of the right to trial by an impartial jury because 1) Trimbur concealed information that would have supported a challenge for cause and 2) the jurors learned of appellee's prior conviction for the same crime.

The magistrate judge found that the state court applied the wrong legal standard to appellee's claim and thus disregarded the state court's findings of fact. The district court concurred, leading to a conditional grant of the writ and this appeal.

II. DISCUSSION

A. Standard of Review.

The President signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) on April 24, 1996. Pub. L. No. 104-132, 110 Stat. 1214 (1996). This circuit has held that the AEDPA applies to appeals pending as of the effective date of the act. *Drinkard v. Johnson*, 97 F.3d 751, 754 (5th Cir. 1996). AEDPA amended the substantive standards of review applicable to habeas cases.

In *Drinkard*, the panel determined that applying § 2254(d)(1) as amended by the AEDPA to pending cases did not raise retroactivity problems since the amendment is a "change in procedural rules" involving "federal standards of review of sate court decisions." 97 F.3d at 766. A habeas petitioner cannot demonstrate reliance on the "former federal standards of habeas review in making strategic, tactical, or other decisions during the state court litigation." *Id.* AEDPA has codified standards for reviewing both the legal and factual determinations of state courts pertinent to a habeas case. With respect to any claim "that was adjudicated on the merits in state court proceedings," a writ shall not be granted unless the petitioner shows that the state court adjudication

> (1) resulted in a decision that was *contrary to*, or involved an unreasonable application of,

> clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

AEDPA § 104, codified at 28 U.S.C. § 2254(d) (emphasis added). AEDPA shields state court findings of fact from reversal in federal court by a presumption of correctness, which may be rebutted only by clear and convincing evidence. AEDPA § 104, codified at 28 U.S.C. § 2254(e)(1).

The following analysis will demonstrate that the lower courts' grant of relief did not satisfy these high standards, but it will also show that, even under pre-AEDPA standards, the lower courts failed to give the appropriate deference to the state court findings. State courts of competent jurisdiction, after a hearing on the merits, made written factual findings supported by the record as a whole. See 28 U.S.C. § 2254(d) pre-AEDPA. We must defer to the state court findings in the absence of any proof that deference was unwarranted; the lower federal courts' mere disagreement with state court fact-findings did not confer authority to disregard them.

B. Reverend Trimbur

The magistrate judge decided that Sheehan's Sixth Amendment right to a fair trial before an impartial jury was violated because the jury foreman, Reverend David Trimbur, concealed on voir dire that he was a reserve deputy sheriff. This concealment allegedly created an inference of bias which, according to the magistrate

judge, would have supported a challenge for cause. The alleged concealment also rendered Sheehan's counsel unable to exercise their peremptory strikes intelligently. The state argues that the magistrate judge failed to give proper deference to the state court findings that Trimbur was not biased. We agree with the state.

To demonstrate that he is entitled to a reversal, a federal defendant who complains that a juror mistakenly responded to a question on voir dire must first demonstrate that a juror failed to answer honestly a material question, and then further show that a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 555-56, 104 S.Ct. 845, 849-50 (1984). We will assume, *arguendo,* that appellee must at least meet this standard to justify relief in a federal habeas proceeding. *See Montoya v. Scott,* 65 F.3d 405, 419 (5th Cir.) ("[W]e assume, *arguendo,* that a *McDonough* theory of juror bias would be sufficient to obtain federal habeas relief."), *cert. denied,* ___ U.S. ___, 116 S.Ct. 1417 (1995).

1. Voir dire.

Juror Trimbur was pastor of the Marksville Baptist Church and an auxiliary deputy with the Avoyelles Parish Sheriff's office. During voir dire, Trimbur was asked:

Q: Are you or any members of your family, or close friends, employed by the District Attorney's Office, or by the Sheriff's Office?

A: No sir.

* * *

Q: Is there any personal, business, family or health reason, that you know of, why you could not serve as an impartial juror in this case?

A: None that I know of.

Exh. A at 918, 919-20. Trimbur was also asked about a Concerned Parents for Better Avoyelles meeting that he attended approximately five weeks prior to trial. Trimbur indicated that he was there in his capacity as a minister and for personal interest and made no mention of any official role he might have played.[4]

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[4] The relevant examination of Trimbur by defense counsel was:

Q. OK. Now, . . . I understand there's some kind of community – I don't want to say outrage or uproar, but conflict about drinking in one of the neighboring towns, and teenage drinking; and Mr. Rabalais [one of the defense attorneys] is involved in that. . . . Have you been to any meetings that Mr. Rabalais's attended or you've attended or Mr. Knoll's [the district attorney] attended, on that issue?

A. Yes.

Q. Tell me about that.

A. I went to see what was going to transpire in the way of exchange of dialogue with the gentleman representing our ABC Board Camp. Mr. Rabalais's connection with that has no bearing on me, OK? I wouldn't – I don't portray myself with this word, 'outrage.' OK?

Later, Trimbur was asked about his knowledge of people involved with the investigation or trial of the case.

Q. Well, I don't know what the right word is, OK? I'm just looking for a word . . . conflict . . .

A. I attended one meeting at the Concerned Parents for Better Avoyelles, if that's what you're referring to.

Q. I don't know.

A. Yes sir, that, I think, is what you're referring to. Mr. Rabalais [one of the defendant's lawyers] was present at that meeting; I know that.

Q. OK, and what about Mr. Knoll [the district attorney]?

A. Yes sir.

* * *

Q. I'm not from here, and I don't know the history of all this. But I understand that there are some interest – I don't – I won't use a catch word, that there's some "interests" and there may be a problem with teenage drinking and driving in particular area[s] of the parish. Is that accurate?

A. That's accurate.

* * *

Q. OK, where is – what is your interest in that issue? . . . And, does that come from just a personal interest as an individual, or is that through your representing the interest of your congregation, or of your religion or, you know, whatever?

A. Through my church . . . that was through personal interest as an individual.

Q. OK. And, has the – is the District Attorney, does he have anything to do with that issue, to your knowledge?

Examination by defense counsel relating to Detective Robert Venable proceeded as follows:

Q. Let me ask you some names and see if you know these folks.

A. Yes sir.

Q. Detective Robert Venable with the Sheriff's Office?

A. Yes sir.

Q. And how do you know Detective Venable?

A. I performed his wedding a year and a half ago.

Q. All right. And, did you have to – when I got married, I met with he [sic] preacher in advance, and he kind of counseled you and stuff, did you do any of that, or did you just do the ceremony?

A. I just did the ceremony.

Q. All right. Did you know his wife?

A. Yes, I did.

A. I think as a concerned parent, he was at the meeting.

Q. OK. But not in an official – there's no official request to him, that you're aware of, or none by you, that . . .

A. None by me.

Q. All right, and none that you're aware of, that you have any action upon?

A. Not that I know of.

Exh. A at 927-929.

Q. Was she a member of your congregation, or he?

A. She was. That was in Evergreen.

Q. All right, have you had any contact with him since that time?

A. I saw him yesterday for a few minutes in the hall, and I asked him about his marriage.

Q. Other than that?

A. No sir. Not really.

Exh. A at 930.

2. Motion for new trial.

In considering Sheehan's motion for new trial, the Louisiana trial court held an evidentiary hearing during which it heard the testimony of Detective Venable, Sergeant Malcolm LaBorde, Trimbur, and Captain Gano Bergeron. The testimony focused on the extent of Trimbur's participation as an auxiliary deputy, Trimbur's relationship with Detective Venable, and Trimbur's explanation of his answers given in voir dire.

Trimbur's service with the Sheriff's Department. Trimbur had been an auxiliary deputy since 1985. His involvement appeared to peak in 1986, but tapered off in 1987 as his job at a new congregation required more of his time. However, he still served as a deputy up to and after the April 1988 trial. Auxiliary deputies are required to spend 16 hours per month serving the department and are not generally paid. However, Trimbur had been paid

$38.53 in November 1987 for one day's work guarding an inmate at a local hospital. Trimbur had ridden in a patrol car with regular deputies, wore a uniform identical to that of a regular deputy, carried a badge, carried a gun, had officer training, and sometimes visited the Sheriff's office when he was not on duty. The Sheriff's office is adjacent to the jail, and Trimbur had counseled prisoners and deputies on spiritual issues. Trimbur had also been called to assist with a crisis relating to Cuban refugees at the jail. Trimbur testified that he had not seen Sheehan at the jail.

At the Concerned Parents for a Better Avoyelles meeting five weeks before the trial, Trimbur had volunteered to the entire group that he was an auxiliary deputy and would relay any concerns that individuals had to the district attorney, sheriff or other appropriate authority.

Trimbur's relationship with Detective Venable. Detective Venable had at least some role in facilitating Trimbur's appointment as an auxiliary sheriff in 1985. In 1986, Trimbur was the pastor of the Evergreen Baptist Church, which Detective Venable attended with his wife, and Trimbur occasionally visited Detective Venable at the Sheriff's office. In 1987, Detective Venable saw Trimbur about once a month, and he had also seen Trimbur at the Sheriff's office in 1988. Detective Venable testified that he had been to Trimbur's home approximately six times; the most recent visit occurred several months before the trial.[5] Detective Venable had seen Trimbur about three or

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[5] Trimbur only recalled two visits when Venable accompanied other parishioners to Trimbur's home for coffee.

four times between January 1988 and April 1988, the time of the trial, and they had discussed the detective's marital problems. However, Trimbur was unaware as of the hearing in June 1988 that Detective Venable had separated from his wife in January 1988. Trimbur had not talked to Detective Venable since the trial began.

Trimbur's explanation of his voir dire testimony. Trimbur stated that he did not reveal his commission as an auxiliary deputy because no one directly asked him about it and he did not consider himself to be "employed" by the Sheriff's office. Trimbur testified that he considered the question about employment by the sheriff's office as a follow-up to the earlier instruction by the court that "members of paid fire and police departments" are entitled to claim an exemption, and he did not consider himself a paid policeman. Trimbur felt that his involvement with the sheriff's department was minimal, and that he was looked upon as an unofficial chaplain rather than an officer. He had forgotten about the one day on which he supervised a hospitalized inmate and was paid $38. Furthermore, Trimbur did not report in voir dire that he had revealed his deputy status at the Concerned Parents For a Better Avoyelles meeting because the district attorney, Mr. Knoll, and two of the defense lawyers, Mr. Rabalais and Mr. Melancon, were present when he made the announcement.[6]

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[6] Trimbur's extensive explanation was contained in the following testimony:

> Q. And please tell me where the meeting was, what the meeting was about and what statement you made.

Sergeant LaBorde testified that he had asked Trimbur how he had been selected for jury service, since, in his

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A. The meeting was Concerned Parents For a Better Avoyelles, is the name under which they were meeting. It was the second meeting that they had, the only meeting that they have had that I attended. I was present, two men from the church I serve was present and my wife was present. It was at Mr. Knoll's [the district attorney] home on March 15th. I went in for the purpose of getting information for my own curiosity about matters related to problems of under-aged drinking in our parish.

Q. Finish your answer, please.

A. Well, I was at that meeting, and that's when I made a statement about being an auxiliary . . .

Q. I'd like for you to tell us if you can, please, the specifics, as you recall them, relating to what caused you to make that statement who you were talking to, who was present, what was the context of the statement, and what you said. I want you to tell us about your actions, not anyone else's.

A. The meeting was called for the purpose of hearing from board member or official of the ABC Board of our State, as to ways that could be explored so that the established laws about under-aged drinking could be better enforced. The gentleman from the ABC Board was there and was telling us of his frustrations from problems that he had in relation to manpower, not being able to get out into the community, and so forth. He made a statement that – something to the effect – and I don't remember the exact words – something to the effect that if there were people in the parishes that he could call upon for

assistance, it would facilitate their being able to follow up on complaints about business establishments, selling intoxicating beverages to under-aged youth. There was between 35 and 40 people at that meeting. I spoke up, there wasn't a lot of us talking; we were listening to Mr. . . . the man who was – the ABC Board man. I spoke up and said in that meeting, in the presence of these people, and I know they heard me, I said, I have a commission, I am a deputy, I have a uniform, if you ever need help in this parish, in this area, call me and I will see if I can work out a way to be of assistance to you. And at that meeting, the prosecuting attorney was there; he was hosting the meeting, and so was both attorneys for the defense present. Mr. Rabalais was sitting immediately to my left, I was immediately to this gentleman's left, that was there; I was sitting on the steps; he was standing; I remember distinctly Mr. Rabalais, the attorney, and Mr. Melancon, the attorney, being at that meeting. So, when I came to court, having been called for jury selection, I listened very carefully to Judge Brouillette's discourse to us about qualifications, disqualifications, and exemptions. I heard him very clearly say that a minister of religion could claim an exemption. I heard him say very clearly that a member of paid fire or police department could be exempted. I did not, when the line formed at his bench, come up and tell him I was a minister of religion. I did not come up and tell him I was an auxiliary deputy, in any capacity. I felt that my involvement with the Department was minimal; I thought that I was looked upon more as a chaplain there, than I was as a policeman. And so, I didn't say anything about

view, "if somebody's working at the Sheriff's Office, they don't serve on the jury." Exh. A at 1555. Sergeant LaBorde testified that Trimbur responded:

"somebody has asked him some questions, you know, if he was working with them, and he said yes." *Id.* at 1556.

State court findings. The state trial court denied the new trial motion, crediting Trimbur's explanation that he associated the question about employment with the sheriff's office with the exemption available for paid members of police departments. The trial court found that Trimbur's interpretation of the questioning was reasonable. The court noted:

> It may be argued that Trimbur's answer to the question was less than full disclosure, even if technically correct. However, his testimony makes it very clear that he did not intentionally mislead anyone. He considered his service as a volunteer auxiliary deputy to be such common knowledge that it did not deserve special comment in the voir dire questioning.
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being a minister, either, until it came out in the questioning, positively I knew, both, the prosecuting attorney and both local defense attorneys, heard me made [sic] that statement, just five weeks before that I was an auxiliary. And I felt if it was of any consequence, they would bring it up. It wasn't to me. And so I . . .

Q. Rev. Trimbur . . .

A. I know it's a long answer, but I'm trying to explain to you why I didn't say anything.

Exh. A at 1571-73.

> The testimony of Rev. Trimbur depicts, in the court's opinion, a very civic-minded individual who wanted to be a good citizen and to participate in civic activities. In voir dire by defendant's counsel, when asked why he did not avail himself of his exemption as a minister, he answered as follows:
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> > Because I'm not just a member or servant of my church; I'm a member of my community; and I feel strongly an obligation to the community.
>
> Exh. A at 1657-58.

The trial court reasoned that since Trimbur had no knowledge of or connections to the crime, the only way to show he was biased and, consequently, disqualified would be if law enforcement officers were disqualified per se.[7] Reviewing the relevant Louisiana law, the trial court held that a volunteer auxiliary deputy would not be

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[7] The court evaluated whether Trimbur's activities categorized him as a law enforcement officer:

> The factors which show him to be in the law enforcement community are that he had a uniform; he occasionally went on patrol with paid deputies; he had a badge; and he had a firearm. The factors which suggest that he was not truly a law officer are that he never made an arrest; he never interrogated a witness; he never used a firearm and never had firearm training; and he never participated in any investigation. While he did not have the title of chaplain, he considered his position to be essentially that. He counseled deputies; he counseled prisoners in the jail; he conducted prayer services when a deputy died in a plane crash.
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> Exh. A at 1657-58.

automatically disqualified. *See State v. Ballard*, 337 So. 2d 481, 483 (La. 1976) (denial of challenge for cause against unpaid volunteer deputy sheriff was not error; "We find no prohibition against jury service by an unpaid volunteer [auxiliary policeman] who peripherally and occasionally assisted in law enforcement.").

In addition, the trial court found that the motion should be denied because Sheehan had not established that he and his counsel were unaware of Trimbur's commission. *See State v. Baxter* 357 So. 2d 271 (La. 1978) (" . . . in order for a defendant to avail himself of the lack of qualification of a juror, it must be made to appear that the disqualification of the juror was not known to defendant, or his counsel, when the juror was accepted by him and could not then have been ascertained by due diligence; and it must be made to appear that such diligence was exercised by an examination of the juror, on his voir dire, touching his qualifications, and that he answered falsely."). The trial court noted that only one of appellee's lawyers, Rodney Rabalais, testified that he was unaware that Trimbur was an auxiliary deputy. Lewis Inglesby and Tucker Melancon, appellee's other two trial lawyers, did not testify to a lack of knowledge. The trial court also noted Trimbur's testimony that he was sure that Rabalais and Melancon knew Trimbur was a deputy. Further, as in *Baxter*, the trial court found that "if it was error for Trimbur to answer that he was not employed by the sheriff's office – and that is certainly not clearly established – then it should be recognized that he was entirely honest." Exh. A at 1660.

As to Trimbur's relationship with Detective Venable, the trial court first noted that this relationship was not

urged as a basis for a motion for new trial. The trial court recounted the short voir dire examination of Trimbur regarding Detective Venable, and concluded that defense counsel was aware of the friendship and should have probed it further. The court further found that "[t]here is nothing to suggest, in the court's opinion, that Trimbur intentionally misled or deceived defense counsel." Exh. A at 1662.

3. Remand from the Louisiana Supreme Court.

Before his appeal was heard by the intermediate court of appeals, Sheehan obtained a writ from the Louisiana Supreme Court ordering the trial court to reopen the hearing on the motion for new trial based on an allegation of newly discovered evidence. At the reopened hearing, appellee presented the testimony of Claire Sharp, a local attorney and member of Trimbur's congregation, who testified that Trimbur had contacted her after receiving a jury summons. Ms. Sharp testified that Trimbur asked for advice about the effect of his religious profession as well as his auxiliary commission on his ability to serve. Ms. Sharp told Trimbur to tell the court and the attorneys about his positions, or to at least answer the voir dire questions openly and honestly. Ms. Sharp also testified that Trimbur told her that "I guess it doesn't matter; everybody knows I'm a minister and an auxiliary deputy anyway," and she responded "yes, I suppose that's true; this is a small town." Exh. A. Supplement at 40.

After hearing this new testimony as well as additional testimony from Trimbur, the trial court again

denied the motion for new trial. The trial court concluded:

> There is certainly nothing ominous, as such, about a prospective juror, calling an attorney, prior to serving, to find out what it's all about, particularly in this case, a member of his congregation. I would suppose it's probably a common occurrence, especially summoned for the first time. Now, if the purpose of talking with an attorney would be to conspire, to do anything improper, then, of course, that would be most significant. The record shows Rev. Trimbur's explanation for the call. It is totally consistent with the testimony of Mrs. Sharp. I have no difficulty accepting his explanation. And I certainly don't feel that he was attempting to calculate a way to mislead anybody in order to serve on the jury. My findings in the reasons for denial of the first motion for a new trial, that he did not attempt to mislead anybody, is certainly still my finding. There's absolutely nothing to suggest that there was any improper reason. In fact, the evidence shows just the opposite.

Exh. A Supplement at 42-43.

4. Appeal to the Louisiana Court of Appeals.

In affirming the denial of the new trial motion, the court of appeals opined at length:

> We have examined this record closely and find that there is nothing in it, nor in the nature of Trimbur's function with the sheriff's office, which would disqualify him from service on the jury. It is apparent that he was a clergyman first, and an auxiliary deputy second. His responses

> on voir dire were not misleading, and did not conceal any information. His relationship to the sheriff's office, as well as his relationship with Detective Venable, were not such as could be expected to destroy the otherwise impartial attitude of this juror. Trimbur was subjected to intense interrogations in an effort to prove specific facts showing such a close connection to the sheriff's office and Detective Venable that bias for the prosecution should be presumed. Trimbur's consistent responses in the record reflect his voir dire commitment to fairness and impartiality. Nothing he said at the hearings supported a finding of bias, actual or implied. What comes across most strongly in the record of all three examinations – the voir dire, the new trial hearing, and the remand hearing – is his relationship with the community and its citizens in his capacity as a minister of religion. He neither sought nor avoided jury duty. He answered every question candidly and without rancor, openness characterizing his every response. Only by a strained manipulation of his words can bias be wrung from his testimony. We agree with the trial court.

Sheehan, 558 So.2d at 763-64.

5. Findings of the magistrate judge.

Contradicting the state court's credibility evaluations, the magistrate judge concluded that Trimbur "deliberately concealed" his auxiliary deputy status and friendship with Detective Venable during voir dire because he did not think it was important and "because he wanted to be on the jury." The magistrate judge drew

an inference of bias, citing *United States v. Scott*, 854 F.2d 697, 699 (5th Cir. 1988) (juror's censoring of fact that brother was a deputy sheriff created inference that he wanted to serve on jury and thought he would not be allowed to serve if he answered completely). The magistrate judge chided the trial court for having "no good basis" to believe that Sheehan's attorneys knew Trimbur was an auxiliary deputy. The magistrate judge then concluded that Sheehan satisfied the first prong of *McDonough* – that a juror had falsely answered a material question on voir dire.

The magistrate judge also decided that a challenge for cause against Trimbur would have been granted because he was an auxiliary deputy. "Louisiana jurisprudence is clear on that point," he stated, citing *State v. Simmons*, 390 So.2d 1317, 1318 (La. 1980) ("an actively employed criminal deputy sheriff is not a competent criminal juror") and *State v. Mitchell*, 475 So.2d 61, 63-4 (La. App. 2d Cir. 1985) (active or reserve police officer is too likely to be influenced as a juror and should be disqualified).

After reciting the concept of deference to state court findings, the magistrate judge concluded that the trial court did not actually find that Trimbur was not biased. And since the magistrate judge read Louisiana law as automatically disqualifying auxiliary deputy sheriffs from jury service, he disagreed with the state courts' application of state law.

6. Analysis.

Whether analyzed under the old or new federal habeas standards, the magistrate judge clearly erred in failing to give appropriate deference to the findings of the Louisiana courts.

The magistrate judge held that the trial court made no express finding whether Trimbur was biased and that Trimbur deliberately concealed information on voir dire, supporting an inference of bias. Yet the trial court explicitly found that Trimbur did not "intentionally mislead anyone," that he "was entirely honest in his answer," and that "there is nothing to suggest . . . that Trimbur intentionally misled or deceived defense counsel." The trial court so ruled after observing voir dire, the entire trial, and two motions for new trial. The record amply supports the state trial court's conclusions. The trial court credited Trimbur's explanation that he reasonably associated the question about employment with the sheriff's office with the exemption for paid policemen, an exemption he believed was not available to him. The trial court found that Trimbur reasonably believed he was not "employed" by the sheriff's department in the common usage of that term. Further, the trial court credited Trimbur's testimony that he believed that all the attorneys knew of his status as an auxiliary deputy, because he had announced it in the attorneys' presence just five weeks before trial. Thus, even if an inference of bias can be drawn from deliberate censoring during voir dire, the trial court found, contrary to the magistrate judge, no deliberate censoring on Trimbur's part. The state court made explicit findings, adequately supported by the

record, that are contrary to the inferences drawn by the magistrate judge. Deference was owed to the state court fact findings, particularly because they were reached after painstaking, meticulous efforts to uncover the relevant facts. Under the AEDPA standard, Sheehan did not prove by clear and convincing evidence that the state court findings were incorrect. *See* 28 U.S.C. § 2254(e)(1) (as amended by AEDPA).

Moreover, the Louisiana court of appeals explicitly found a lack of bias. *Sheehan*, 558 So.2d at 764 ("Nothing he said at the Hearings supported the finding of bias, actual or implied."). Findings of state courts at all levels must be given appropriate deference. *Rushen v. Spain*, 464 U.S. 114, 120, ___ S.Ct. ___, ___ (1983) (per curiam). The magistrate judged erred by not even addressing this finding.

Also contrary to the magistrate judge's conclusion, the Louisiana courts correctly applied Louisiana law in the issue of disqualifying auxiliary deputies. While the magistrate judge quotes language from *Simmons*, 390 So.2d at 1318, and *Mitchell*, 475 So.2d at 62-63, that supports his interpretation of Louisiana law,[8] compelling caselaw justifies a conclusion that someone in Trimbur's position would not be automatically disqualified from jury service. The trial court cited the decision in *Ballard*, in which the Louisiana Supreme court held that it was

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[8] However, *Simmons* involved a paid, full-time investigator with the Sheriff's department 390 So.2d at 1318, and *Mitchell* involved an active reserve police officer, and although it is not clear from the opinion, it appears that the officer was a paid employee. *Mitchell*, 475 So.2d at 62-63.

unnecessary to grant a challenge for cause against an unpaid volunteer deputy sheriff. 337 So.2d at 43. But perhaps most relevant is the decision of the court of appeals in this very case, which the Louisiana Supreme Court declined to reverse, holding that "there is nothing in [the record], nor in the nature of Trimbur's function with the Sheriff's office, which would disqualify him from service on the jury." *Sheehan*, 558 So.2d at 763.

Thus, the magistrate judge erred in disregarding the state court findings in this case and in concluding that Sheehan met the two prongs of *McDonough*. We must defer to the state court findings that Trimbur did not intentionally mislead the court or defense counsel, and that even full information regarding Trimbur's position with the Sheriff's department and his relationship with Detective Venable would not support a challenge for cause.[9]

Alternatively, the denial of the motion for new trial can be sustained on the independent state law ground that Sheehan's trial attorneys knew of Trimbur's status as an auxiliary deputy sheriff and failed to use reasonable diligence to pursue further information about his relationship with the sheriff's department. The magistrate judge erroneously concluded that the trial court "had no good basis" for believing that the defense attorneys heard Trimbur announce his auxiliary deputy status at a "noisy public meeting" five weeks earlier, remembered it, and

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[9] Even if Louisiana law would have supported a challenge for cause based on Trimbur's auxiliary deputy status, Sheehan has still not shown that he is *constitutionally* entitled to a challenge for cause on that basis.

"deliberately concealed the fact of Trimbur's employment as a deputy sheriff as a trial strategy." First, the state trial judge had ample basis: Trimbur testified that one of the attorneys sat right next to him at the meeting, that he made the announcement loudly, and that "no one else was speaking at that time. I cannot conceive of everyone in that room not having heard what I said." The trial judge was not required to believe Mr. Rabalais' testimony that he never heard Trimbur's announcement. Second, Trimbur's wife worked for a company owned by Tucker Melancon, one of appellee's attorneys. Finally, the trial judge never found that appellee's attorneys deliberately concealed their knowledge of Trimbur's background as a trial strategy. Louisiana law requires the defendant to show that he and his lawyers had no knowledge of the facts supporting disqualification and used reasonable diligence to pursue these facts. The trial court found that Sheehan had not met this burden, not that his attorneys deliberately concealed the information as trial strategy. The magistrate judge's contrary conclusion is a clear error. Sheehan's challenge to Trimbur's service on the jury fails on this adequate and independent state law ground as well.

C. Prejudicial extraneous information.

The magistrate judge also decided that Sheehan's right to a fair trial before an impartial jury was violated because, before reaching the verdict, one or more jurors learned of Sheehan's prior trial and conviction for this same crime. The state again objects that the magistrate

judge failed properly to defer to the state-court findings of fact and applied the wrong legal standard.

The Supreme Court's cases in this area "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy v. Florida*, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036 (1975). In federal trials, exposure of the jury to information about prior felony convictions is presumed to be prejudicial, but this is a rule based on a federal court's inherent power to control its proceedings and is not constitutionally required. *Id.* at 797, 95 S.Ct. at 2035 (rejecting the application of *Marshall v. U.S.*, 360 U.S. 310 (1959) to a state prisoner's claim on federal habeas corpus). Instead, "we must turn . . . to any indications in the totality of the circumstances that petitioner's trial was not fundamentally fair." *Id.* at 799, 95 S.Ct. at 2036. Although a juror may be presumed to be biased if exposed to "inherently prejudicial facts about the defendant" so that "the court deems it highly unlikely that the juror can exercise independent judgment," the "court will not readily presume that a juror is biased solely on the basis that he or she has been exposed to prejudicial information about the defendant outside the courtroom." *Willie v. Maggio*, 737 F.2d 1372, 1379 (5th Cir.), *cert. denied*, 469 U.S. 1002 (1984). Thus, we must decide if "the actions called into question were such as to reasonably result in the possibility of prejudice." *Durr v. Cook*, 589 F.2d 891, 894 (5th Cir. 1979). Evaluation of a claim requires findings relating to the impact of the extraneous information on the verdict. *Id.* at 894.

In considering appellee's motion for new trial, the trial court conducted a hearing[10] at which Terri Taylor, a juror who voted not guilty, testified that she was told of the prior trial and conviction at church. Mrs. Taylor testified that although she did not tell any other jurors about what she learned, she heard other jurors discuss appellee's previous trial and conviction. Mrs. Taylor also testified that David Gauthier, another juror, spoke about appellee's prior trial and conviction.[11] Exh. A at 1639. Mrs. Taylor also testified that another juror, Burnette Bordelon, related to Mrs. Taylor that Mrs. Bordelon's husband read aloud a newspaper article about the trial at breakfast. *Id.* at 1641. Mrs. Taylor did not indicate whether the newspaper accounts discussed a prior trial.[12] However, Mrs. Bordelon denied that she had read any

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[10] The trial court sustained the state's objections to testimony about juror misconduct under La. R.S. 15:470 (replaced by La. C. Art. 606), which allows testimony by jurors as to misconduct by third persons but not as to juror misconduct. However, the trial court allowed Sheehan to offer testimony of juror misconduct as a proffer, recognizing that this evidentiary rule must give way to a defendant's constitutional right to a fair trial. *State v. Senigal*, 393 So.2d 684 (La. 1981). The trial court's discussion of prejudice assumes that the proffered evidence is admissible. Exh. A at 1665.

[11] Mrs. Taylor testified that " . . . it was in the jury room on Saturday morning, and he had said he knew a friend of a friend, or a relation somewhat to that nature, that had served on the previous jury, and that he had considered that night calling and speaking with him, but he had changed his mind; he decided not to, because he didn't want to be prejudiced." Exh. A at 1639.

[12] The trial court noted that it had monitored news accounts of the trial and that none had mentioned the prior trial or conviction while the trial was in progress.

article about the trial or that her husband had read aloud any article about the trial. *Id.* at 1618.

Gwendolyn Small, an alternate juror, testified that she overheard other jury members say that the defendant had been tried before, but not that the defendant was convicted. Exh. A at 1626. She could not remember who said it or when. Trimbur also testified that he learned at the end of the day on the last day of deliberations that Sheehan had previously been tried, but not that he had been previously convicted. *Id.* at 1586-87.

The trial court found that the only evidence that the jury heard of appellee's prior conviction came from the testimony of Mrs. Taylor, who voted to acquit and thus was not prejudiced, and who stated that she did not discuss the prior convictions with other jurors. The trial court also pointed to its instructions to the jury to consider only the evidence introduced at trial, recognizing that such an instruction could not cure all error but was a factor in the overall consideration of prejudice. Further, the trial court considered evidence that a previous jury had convicted the defendant for the same conduct to be less prejudicial than evidence suggesting a pattern of conduct, such as that the defendant had been convicted of similar conduct in the past.[13] The trial court did not believe that a defendant had an absolute constitutional right to have a jury that had not heard of this prior conviction and concluded that any extraneous influence

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[13] "There is no reason for a juror to believe that another jury had more or better evidence than in the present case." Exh. A at 1667.

on the jury "was not prejudicial to the extent of requiring a new trial."

The magistrate judge decided that the trial court's ruling was based on an erroneous conclusion of law – that juror knowledge of a prior conviction for the same offense was not a per se constitutional violation – and gave the trial court findings no deference. The magistrate judge inferred that other jurors must have participated in the discussions of appellee's prior trial and conviction, and thus inherently prejudicial extrinsic information was considered by the jury. The magistrate judge relied primarily on cases reviewing federal criminal convictions. *See, e.g., United States v. Howard,* 506 F.2d 865 (5th Cir. 1975) (post-conviction proceedings for federal prisoner); *United States v. Williams,* 568 F.2d 464 (5th Cir. 1978) (direct appeal of federal conviction).

The magistrate judge's decision to disregard the state court findings was erroneous. Juror exposure to extraneous information must be examined on case-by-case basis to determine if there is a reasonable probability of prejudice. *See Murphy,* 421 U.S. at 797, 95 S.Ct. at 2035; *Durr,* 589 F.2d at 894. Thus, the state court did not err in considering all the circumstances in evaluating prejudice, rather than concluding that the jury's exposure to information about appellee's prior conviction was a per se constitutional violation.

The state court found that the only evidence of extraneous influence on the jury's deliberations was the information passed on to Mrs. Taylor at church, that Mrs. Taylor did not pass on the information to other jurors, and that Mrs. Taylor voted to acquit. The trial court also

specifically found that press coverage during the trial did not reveal appellee's prior trial and conviction. The trial court considered that Trimbur and Ms. Small, the latter an alternate juror, heard about Sheehan's prior trial but not his conviction. The only evidence that any juror other than Mrs. Taylor learned of Sheehan's prior conviction is the testimony of Mrs. Taylor that David Gauthier spoke about appellee's prior trial and conviction. Based on this evidence, the magistrate judge inferred that other jurors must have participated in discussions of appellee's prior trial and conviction, and he then summarily concluded that appellee's right to a fair trial was violated. The magistrate judge did not distinguish among jurors who heard different information, stating that three jurors had learned of appellee's prior trial and conviction, when in fact two jurors testified that they only learned of his trial.

The trial court heard firsthand the testimony of the three jurors and was in a better position to judge the subtleties of and appropriate inferences to be drawn from their testimony. The trial court appropriately noted that the only juror to testify that she had heard of appellee's prior conviction voted to acquit. *See Durr*, 589 F.2d at 894, n. 4 (possibility that jury member alleged to have introduced outside information voted to acquit is a factor in deciding if there is a reasonable probability of prejudice). In addition, the trial court appropriately weighed the expected impact of the limiting instruction. After considering the evidence under all the circumstances, the trial court found no possibility of prejudice, concluding:

> The ultimate issue [in a motion for new trial] therefore is whether an injustice has been done to the defendant. Admitting that there may have

> been imperfection, this court can say without reservation or hesitation that the evidence clearly supports the jury's verdict and that no injustice was done to this defendant. Accordingly, he is not entitled to a new trial.

Exh. A at 1669. The court of appeals similarly concluded:

> If this testimony of Mrs. Taylor is treated as evidence of juror misconduct, it was inadmissible. If the testimony is treated as evidence of an unauthorized communication resulting from misconduct of a third person (at the church meeting), and therefore admissible, it nevertheless offended no substantial rights of the defendant, for two reasons: first, Mrs. Taylor testified that she did not pass the information on and, second, she voted for an acquittal.

Sheehen, 558 So.2d at 764.

Under the court's supervisory power to control the processes of its courts, this court has reversed a federal conviction where jurors learned of the defendant's prior conviction in the same matter. *United States v. Williams*, 568 F.2d 464, 470-71 (5th Cir. 1978) ("we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged"). However, the state court in this case, who observed the entire trial, including the jurors' testimony in voir dire and at the evidentiary hearing, found no prejudice. Mrs. Taylor's vote to acquit provides at least some credibility to the trial court's analysis of the relative prejudicial effect of knowledge of appellee's prior conviction. Sheehan has pointed to no decision establishing his absolute constitutional right to a jury that is ignorant of his prior conviction. The *Williams* decision

itself acknowledges that it is following a federal criminal rule, not a constitutional mandate, and that the determination of prejudice is a fact-specific inquiry. *Id.* at 469. Furthermore, even in reviewing federal criminal convictions, we give great deference to a trial court determination that there is no reasonable probability of prejudice. *See United States v. O'Keefe*, 722 F.2d 1175, 1179 (5th Cir. 1983) ("appellate court should accord great weight to the trial court's finding that the [extrinsic] evidence in no way interfered with any juror's decision").

We conclude that the lower courts erred awarding habeas relief. The state courts found no reasonable probability of prejudice, and this conclusion as well as the underlying factual findings is fairly supported by the record. Under the AEDPA standards, the state court decision was not contrary to or an unreasonable application of federal law, and there is no basis for asserting that the state factfindings should not be presumed correct.

CONCLUSION

For the foregoing reasons, we REVERSE the decision of the district court and render judgment denying appellee's request for writ of habeas corpus.

REVERSED.

APPENDIX 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JOHN ANTHONY SHEEHAN	CIVIL ACTION NO. 94-2249
-vs-	SECTION "P" (JUDGE LITTLE)
WARDEN, LSP	

MINUTE ENTRY

(Filed May 15, 1995)

This habeas matter is referred to John F. Simon, U.S. Magistrate, for his report and recommendation.

Alexandria, Louisiana

12 May 1995

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/s/ F. A. Little, Jr.
F. A. LITTLE, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JOHN ANTHONY SHEEHAN, Petitioner	CIVIL ACTION SECTION "P" NO. CV94-2249-A
VERSUS	
JOHN P. WHITLEY, WARDEN, ET AL, Respondents	JUDGE LITTLE MAGISTRATE JUDGE SIMON

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE
(Filed Oct. 3, 1995)

This matter was referred to the undersigned Magistrate Judge for report and recommendation by order of Judge F.A. Little, Jr. (Doc. Item 10). I will recommend that petitioner's pending petition for writ of *habeas corpus* be granted.

Statement of Claim

Before the court is a petition for writ of *habeas corpus* filed by petitioner John Anthony Sheehan ("Sheehan") on December 8, 1994. Sheehan is contesting the validity of his 1988 second degree murder conviction by the Louisiana 12th Judicial District Court in Avoyelles Parish, Louisiana, on the following grounds:

> 1. Petitioner was denied a fair trial before an impartial jury because David Trimbur, the foreman of petitioner's jury, was a reserve deputy sheriff with the Avoyelles Parish Sheriff's

Department, which department investigated the shooting of petitioner's wife, and was also a close personal friend and confidante of the State's key police witness, who incidentally was the investigating detective in the matter.

2. Petitioner was denied a fair trial before an impartial jury because extrinsic information, specifically, petitioner's prior trial and conviction, tainted the jury's deliberations.

3. Petitioner was denied a fair trial before an impartial jury because the trial judge denied him a change of venue; specifically, newspaper, radio and television reports regarding his first trial and conviction saturated the community with prejudicial pretrial publicity.

Sheehan claims, respondent admits, and the record reflects exhaustion of Sheehan's available state remedies (See Exs. "B" and "F").

Law and Analysis

Rule 8(a) Resolution

This court is able to receive the merits of this *habeas corpus* petition without the necessity of an evidentiary hearing because there is no genuine issue of material fact that is relevant to the claims of the petitioner, and the State court records provide the required and adequate factual basis necessary to the resolution of the *habeas corpus* petition. *Passman v. Blackburn*, 797 F.2d 1335, 1340 (5th Cir. 1986), *cert. den.*, 480 U.S. 948, 107 S.Ct. 1609, 94 L.Ed.2d 794 (1987); *Easter v. Estelle*, 609 F.2d 756, 761 (5th Cir. 1980); Habeas Corpus Rule 8(a).

Ground No. 1 – Biased Jury Foreman

Sheehan contends he was denied his right to an impartial jury because one of the potential jurors, David Trimbur ("Trimbur"), who later became the jury foreman, deliberately concealed his association with the Avoyelles Parish Sheriff's Office, where he served as an auxiliary Deputy Sheriff, and also concealed his friendship with Robert Venable, the detective with the Avoyelles Parish Sheriff's Office who led the investigation of Sheehan's case and testified as a prosecution witness at trial.

1. The Law

One touchstone of a fair trial is an impartial trier of fact – "a jury capable and willing to decide the case solely on the evidence before it." *Voir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on *voir dire* may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 849, 78 L.Ed.2d 663 (1984).[1]

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[1] *McDonough* was a civil case, but the Fifth Circuit has found the standard for evaluating juror misconduct that was stated in that case is also applicable in criminal cases. *U.S. v. Scott*, 854 F.2d 697, 698 (5th Cir. 1988).

In *Pruett v. Thigpen*, 665 F.Supp. 1254, 1266 (N.D. Miss.), aff'd, 805 F.2d 1032 (5th Cir. 1986), cert. den., 481 U.S. 1033, 107 S.Ct. 1964, 95 L.Ed.2d 535 (1987), a *habeas* case raising the issue of a denied challenge for cause, the district court stated that due process at a minimum requires that a jury be capable and willing to decide the issue solely on the evidence before it, and held that the participation in jury deliberations of an admittedly biased juror constitutes error of constitutional dimension recognizable in a *habeas* proceeding. To prevail, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial. *McDonough Power Equipment, Inc.*, 464 U.S. at 556, 104 S.Ct. at 850. Also, *U.S. v. Buckhalter*, 986 F.2d 875, 878-79 (5th Cir. 1993), cert. den., ___ U.S. ___, 114 S.Ct. 203, 126 L.Ed.2d 160 (1993); *U.S. v. Scott*, 854 F.2d 697, 698 (5th Cir. 1988). The remedy for allegations for juror partiality is a hearing in which the defendant has the opportunity to prove actual bias, *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 945, 71 L.Ed.2d 78 (1982) (a *habeas* case). The findings of the state court are presumptively correct under 28 U.S.C. §2254(d). *Smith*, 455 U.S. at 218, 102 S.Ct. at 946.

The Fifth Circuit case of *U.S. v. Scott*, 854 F.2d 697, 698 (5th Cir. 1988), is factually similar to the case at bar. Although *Scott* involved a direct appeal rather than a *habeas* petition, the principles enunciated in *Scott* are applicable to this case. In *Scott*, the issue of juror bias

arose when it was discovered after trial that Mr. Buras, the jury foreman, had a brother who was a Jefferson Parish Deputy Sheriff. At a hearing on the defendant's motion for a new trial, Buras acknowledged that his brother was a deputy sheriff but stated that he had not furnished the information in answer to the trial judge's question as to relatives in law enforcement because he did not think that it would affect his judgment in the case. The trial judge found that Buras's failure to disclose the relationship was "unreasonable" but, nevertheless, also concluded that Buras "sincerely" believed that his brother's position would not affect his impartiality as a juror. On appeal, the Fifth Circuit held that a new trial was required due to implied juror bias, stating:

> "There is no dispute that Buras would have been challenged and excused for cause had he revealed that his brother was a deputy sheriff in the Jefferson Parish Sheriff's Office. The dispute here, as the trial judge and the United States couched it, is whether Buras 'failed to answer *honestly*'. At bottom, however, the issue is whether Buras was biased because of his relationship with his brother.
>
> "The district court found that Buras was 'sincere'. That is an insufficient basis for the court to accept Buras as a juror. A finding of 'sincerity' is not the same as a finding that the juror was unbiased. A juror may not conceal material facts disqualifying him simply because he *sincerely* believes that he can be fair in spite of them . . . " 854 F.2d at 698-99.

The Fifth Circuit reasoned that Buras had concealed the fact that his brother was a deputy sheriff because he had

wanted to be on the jury and knew he would be excused if he admitted the relationship; the court found that bias was *implied* by the circumstances. "When possible non-objectivity is secreted and compounded by the untruthfulness of a potential juror's answer on *voir dire*, the result is a deprivation of the defendant's right to a fair trial." *Scott*, 854 F.2d at 699-700, and cases cited therein.

2. The Trial & Hearing

In the case at bar, the jury foreman, David Trimbur ("Trimbur"), was a Baptist pastor and an auxiliary Deputy Sheriff for the Avoyelles Parish Sheriff's Department. At *voir dire*, when asked about his occupation, Trimbur replied only that he was a pastor (Ex. A, Vol. 4, p. 917[2]), and testified that he had never had any dealings with the Avoyelles Parish District Attorney, Eddie Knoll (Ex. A, Vol. 4, p. 917). Trimbur's testimony, in pertinent part, was as follows:

> "Q. Are you or any members of your family, or close friends, employed by the District Attorney's Office, or by the Sheriff's Office?
>
> "A. No sir." (Ex. A, Vol. 4, p. 918).
>
> * * *
>
> "Q. Is there any personal, business, family or health reason, that you know of, why you could not serve as an impartial juror in this case?

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[2] The page numbers referred to are those written at the bottom right hand corner of each page.

"A. None that I know of." (Ex. A, Vol. 4, pp. 919-20).

* * *

"Q. Yes sir. Now, have you been involved in some – well, let me ask you this, Reverend: The Judge told you could claim your [minister's] exemption, and you chose not to. I'd like to ask you why not?

"A. Because I'm not just a member or servant of my church; I'm a member of my community; and I feel strongly an obligation in my community." (Ex. A, Vol. 4, p. 925).

* * *

"Q. OK. Now, the other thing is, being in the city like you have, I'm curious, have you had any kind of – I understand there's some kind of community – I don't want to say outrage or uproar, but conflict about drinking in one of the neighboring towns, and teenage drinking; and Mr. Rabalais is involved in that. Are you – does that refresh your memory? Have you been to any meetings that Mr. Rabalais's attended or you've attended, or Mr. Knoll's attended, on that issue?

"A. Yes.

"Q. Tell me about that.

"A. I went to see what was going to transpire in the way of exchange of dialogue with the gentleman representing our ABC Board Camp. Mr. Rabalais, connection with that has no bearing on me, OK? I wouldn't – I don't portray myself with this word, 'outrage.' OK? . . . I attended one meeting at the Concerned Parents

for Better Avoyelles, if that's what you're referring to. . . . Mr. Rabalais was present at the meeting; I know that.

"Q. OK, and what about Mr. Knoll?

"A. Yes, sir. . . .

"Q. OK, where is – what is your interest in that issue? You know, I can follow up and you can answer all the questions. And, does that come from just a personal interest as an individual, or is that through your representing the interest of your congregation, or of your religion or, you know, whatever?

"A. Through my church . . . that was through personal interest as an individual." (Ex. A, Vol. 4, pp. 927-29).

* * *

"Q. Let me ask you some names and see if you know these folks.

"A. Yes sir.

"Q. Detective Robert Venable with the Sheriff's Office?

"A. Yes sir.

"Q. And how do you know Detective Venable?

"A. I performed his wedding a year and a half ago.

"Q. All right. And, did you have to – when I got married, I met with the preacher in advance, and he kind of counselled you and stuff, did you do any of that, or did you just do the ceremony?

"A. I just did the ceremony.

"Q. All right. Do you know his wife?

"A. Yes, I did.

"Q. Was she a member of your congregation, or he?

"A. She was. That was in Evergreen.

"Q. All right, have you had any contact with him since that time?

"A. I saw him yesterday for a few minutes in the hall, and I asked him about his marriage.

"Q. Other than that?

"A. No sir. Not really." (Ex. A, Vol. 4, p. 930).

After trial, it was discovered by both sides that Trimbur was a commissioned auxiliary Deputy Sheriff, who had a uniform, a gun and a badge, who attended monthly meetings, and who went on patrol and assisted the regular officers in carrying out their duties (Ex. A, Vol. 8, pp, 1557-62). Trimbur had been an active auxiliary Deputy since 1985 and was so through the time of Sheehan's trial (Tr. pp. 1562-63). Sheehan filed a motion for a new trial (Ex. A, Vol. 7, p. 1514-16) based in part on Trimbur's alleged bias. A contradictory hearing was held on June 28, 1988 (Ex. A, Vol. 7-8, pp. 1525-1653).

At the hearing, Detective Robert E. Venable, the lead investigator in the Sheehan homicide, testified that Trimbur was the pastor of a church Venable had attended in 1986 with his wife (Ex. A, Vol. 7, pp. 1534-35); that Trimbur visited Venable at the Sheriff's Office a few times in 1986 (pp. 1535-36); that Venable had assisted Trimbur in

becoming an auxiliary deputy by making a recommendation to the Sheriff on his behalf (pp. 1539-40); that, in 1987, through January 1988, Venable saw Trimbur about once a month (pp. 1540-41); Venable saw Trimbur at the Sheriff's Office in 1988 (p. 1541); Venable had visited in the Trimbur home about half a dozen times, the last visit about two to three months before the hearing, for coffee (p. 1543); and Venable saw Trimbur three or four times between January 1988 and April 1988 (the time of Sheehan's trial) to discuss Venable's marital problems (p. 1545).

Sergeant Malcolm LaBorde, an Avoyelles Parish Sheriff's Deputy, testified that he had ridden in a patrol car with Trimbur in 1987 (Ex. A, Vol. 7, pp. 1549-50), that regular deputies and auxiliary deputies wear identical uniforms (p. 1550), that Trimbur carries a gun and has had officer training (Ex. A, Vol. 8, p. 1551), and that Trimbur sometimes visited the Sheriff's Office even when he was not working (p. 1555). LaBorde also testified that he had asked Trimbur how he had been selected on the Sheehan jury, since people working at the Sheriff's Office don't usually serve on the jury (Tr. p. 1555). LaBorde stated that Trimbur had said "somebody had asked him some questions, if he was working with [the Sheriff's Office], and he said yes" (p. 1556).

Finally, Trimbur testified at the hearing; Trimbur's testimony was riddled with inconsistencies. Trimbur testified that he worked as an auxiliary deputy a lot in 1986 (Ex. A, Vol. 8, pp. 1564, 1566), much less in 1987 (only about a dozen days) (p. 1566), some unspecified days in the period from January 1988-March 1988 (less than a

dozen) (pp. 1564, 1566), and in May, 1988 (p. 1564).[3] Trimbur said that he had been paid $38.53 by the Sheriff's Office in November 1987 for providing security for an inmate at Humana Hospital (p. 1590-91). Trimbur stated that he also counselled inmates on spiritual matters (p. 1567-68) and in 1988, before the Sheehan trial, he had been requested by the Sheriff's Office to evaluate an inmate regarding the inmate's proposed marriage, which he had done (p. 1568). Trimbur stated that he did not recall ever having seen Sheehan at the jail (p. 1568-69).

Trimbur also testified that Deputy Venable had visited Trimbur's home, briefly, two times after June 1987, including in early 1988, "to just drop by and say hello" and that he had stopped to say hello to Venable at the Sheriff's Office (p. 1569). However, upon specific questioning, Trimbur admitted that he had talked with Venable about spiritual matters and his marital problems, but that he had not spoken with Venable during or since the Sheehan trial (p. 1570). Trimbur further admitted that, although he had stated during *voir dire* that the only contact he had with Detective Venable was when he married him and when he asked him in the hall, just before trial, how his marriage was going, he had actually counselled Venable for his marital problems through 1988 and Venable had, in fact, visited Trimbur's home before (p. 1577).

Trimbur testified that he "was not employed by [the Avoyelles Parish Sheriff's Office]" at the time he was

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[3] Sheehan's trial, in which Trimbur served as the jury foreman, began on April 25, 1988.

selected to serve on the jury and that "he was never asked" whether or not he was an auxiliary deputy (p. 1593). Trimbur also said he did not recall the trial judge asking him if he had been employed by the Sheriff's Office, but stated that he had not told the trial judge that he was an auxiliary deputy sheriff in Avoyelles Parish because he felt his involvement with the Sheriff's Office was minimal, that he was "looked upon more as a chaplain there, than I was as a policeman," and he did not feel it was necessary to tell the trial judge that he was an auxiliary deputy (p. 1573). However, Trimbur stated that, when he attended a meeting of Concerned Parents for a Better Avoyelles on March 15, 1988, at Eddie Knoll's house, he told everyone there that he was an auxiliary deputy sheriff and that he would assist them in any way he could; Trimbur said there were a lot of people there, including D.A. Eddie Knoll and two of Sheehan's defense attorneys, Mr. Rabalais and Mr. Melancon, and that, although there were other people talking when he spoke, he assumed that Knoll, Rabalais and Melancon had heard him (pp. 1571-72). Trimbur stated that he did not think it was necessary for him to tell the trial judge that he was an auxiliary deputy because he assumed the D.A. and the two defense attorneys knew he was one from hearing him say so at the Concerned Parents meeting five weeks before and they would bring it up themselves "if it was of any consequence" (p. 1573). However, at the hearing, Mr. Rabalais testified that he did not remember hearing Trimbur say he was an auxiliary deputy (p. 1604), and that he was shocked when he discovered that after the trial (p. 1608). Mr. Knoll did not testify, and Mr. Melancon and Mr. Unglesby (also a defense attorney) were not present

at the hearing and, so, did not testify as to whether or not they had heard Trimbur.

Trimbur further testified at the hearing that, when questioned by the defense during *voir dire* as to why he was at that meeting, he did not say he had taken on the role of a volunteer police officer while at the meeting because he "didn't feel it had any consequence at all, in this trial" (p. 1574).

Finally, Captain Gano Bergeron, of the Avoyelles Parish Sheriff's Office, testified that he knew Trimbur from the Sheriff's Office (p. 1597), that Trimbur was one of the more concerned auxiliary deputies (p. 1600), and that Trimbur worked more than the required minimum 16 hours per month (p. 1599).

After the hearing on Sheehan's motion for a new trial, the trial judge denied Sheehan's motion because there was an issue as to whether Trimbur was actually "employed" by the Sheriff's Office, since he was only a volunteer deputy (although he was paid $38.54 in 1987 for staying with a hospitalized prisoner) and because, although Trimbur's answer on *voir dire* was arguably "less than a full disclosure", Trimbur "did not intentionally mislead anyone" (Ex. A, Vol. 8, pp. 1657). The trial judge further reasoned that the only way the defense could show bias on the part of Trimbur was to show, in the abstract, that law enforcement personnel are prosecution oriented, since Trimbur had stated that he had no prior knowledge about Sheehan's case (p. 1657). The trial judge concluded that the jurisprudence does not support such a conclusion and found that Trimbur wanted to participate in the trial because he was civic-minded (pp.

1658-59). The trial judge also discussed the fact that Trimbur had testified that the three defense attorneys knew he was a deputy sheriff because two of them, Mr. Rabalais and Mr. Melançon (now Judge), were present at a meeting, five weeks prior to trial, where Trimbur had admitted it. The trial judge noted that only one of Trimbur's three trial attorneys was present at the new trial hearing and that he was the only one who stated that he was unaware that Trimbur was a volunteer deputy (p. 1660). Finally, the trial judge found Trimbur had not intentionally misled the defense attorneys about his friendship with Venable, stating that the attorneys should have asked more questions about it (pp. 1661-62).

3. Analysis

The first prong of Sheehan's burden of proof is to show that Trimbur lied during *voir dire*. The record of the *voir dire* shows that Trimbur deliberately concealed his connection with law enforcement, through denial of his employment with the Sheriff's Office,[4] and deliberately

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[4] The trial judge's strained interpretation of the term "employed" does not support the State's position; whether "employed" encompasses volunteer workers or not, the fact remains that Trimbur had actually been paid something by the Sheriff's Office before. Moreover, according to *Webster's Third New International Dictionary, Unabridged* (1986), p. 743, "employ" means "something on which one is employed or with which he is occupied; use, purpose; the state of being employed especially for wages or a salary by someone or something; an official public position." This definition includes volunteer work by implication, particularly volunteer work in a public official position, such as an auxiliary deputy sheriff.

concealed his friendship and contacts with a key prosecution witness in the case, Detective Venable, the lead detective in the investigation of Sheehan.

The trial judge had no good basis for accepting Trimbur's statement that Mr. Rabalais and Mr. Melançon were paying attention to him, heard him announce that he was an auxiliary deputy at a noisy public meeting five weeks prior to trial, and remembered it, and from that, making the inference that those two defense attorneys deliberately concealed the fact of Trimbur's employment as a deputy sheriff as a trial strategy (Ex. A, Vol. 8, p. 1660). In contrast, the trial judge failed to mention that D.A. Knoll was also at that meeting and also did not recall Trimbur's statement that he is a Deputy Sheriff, and did not infer that D.A. Knoll, likewise, deliberately concealed that fact.

The facts and circumstances of this case, taken as a whole, show that Trimbur deliberately concealed his employment with the Sheriff's Office because he wanted to be on the jury; in fact, he was the jury foreman. Trimbur was asked to state his employment with the Sheriff's Office and did not do so because he "did not think it was important". Trimbur did not take his minister's exemption because "he wanted to serve on this jury". Whether or not Trimbur believed his job as an auxiliary deputy would not influence his judgment as a juror, and, through him, the other jurors, is irrelevant; that was not his decision to make. See *Scott*, 854 F.2d at 699 (juror's conscious censoring of the information that his brother was a deputy sheriff created a strong inference that he wanted to serve on the jury and thought it unlikely that the court or defense counsel would permit him to do so).

Sheehan has also carried the second prong of his burden or proof – that a challenge for cause on Trimbur, due to the fact that he was an active auxiliary deputy sheriff, would have been granted. Louisiana jurisprudence is clear on that point: "an actively employed criminal deputy sheriff is not a competent criminal juror." *State v. Simmons*, 390 So.2d 1317, 1318 (La. 1980). One serving as an active or reserve police officer at the time of trial is too likely to be influenced as a juror by that association and should be disqualified from the jury. *State v. Mitchell*, 475 So.2d 61, 63-4 (La. App. 2d Cir. 1985), and cases cited therein. Also, *Usner v. Strobach*, 591 So.2d 713, 724 (La. App. 1st Cir. 1991), writ den., 592 So.2d 1289 (La. 1992); *State v. White*, 535 So.2d 929, 935 (La. App. 2d Cir. 1988), writ den., 537 So.2d 1161 (La. 1989). A challenge for cause on Trimbur would have been granted due to the fact that he was an active criminal auxiliary deputy sheriff.[5]

Finally, I note that, unlike *Scott*, this is a *habeas* proceeding, in which the factual findings of the state court are entitled to a presumption of correctness. 28 U.S.C. §2254. *Sumner v. Mata*, 449 U.S. 539, 545-47, 101 S.Ct. 764, 768-69, 66 L.Ed.2d 722 (1981). However, in the instant case, the trial judge made no finding as to whether the circumstances indicated that Trimbur was biased; he only found that a deputy sheriff was not disqualified from serving as a juror because he could not be considered

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[5] Trimbur (Ex. A, Vol. 8, pp. 1559-65) and Deputy Sheriff Malcolm LaBorde (Ex. A, Vols. 7-8, pp. 1548-51) testified at the hearing on the motion for new trial that Trimbur had assisted in patrolling the streets, making arrests, investigating complaints, transporting people to jail, and making out offense reports, all criminal law enforcement duties.

biased *per se*, which is actually an erroneous statement of the law. An inference of bias was created by Trimbur's conscious censoring of the information that he was an auxiliary Deputy Sheriff and that he was friends with Detective Venable; but, as an active auxiliary deputy sheriff, he was considered to be biased as a matter of law.

Therefore, I will recommend that Sheehan's petition for writ of *habeas corpus* be granted on the ground that he was denied his right to an impartial jury due to the presence in his jury of a biased juror.

Ground No. 2 – Prior Trial & Conviction

Next, Sheehan contends he was denied his right to a fair trial because extrinsic information relating to Sheehan's prior trial and conviction on the same charge, which conviction was subsequently reversed and vacated,[6] tainted the jury's deliberations.

A defendant has the right to a trial by an impartial jury and the right to be confronted with the witnesses against him. The evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. The rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial. *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 470, 17 L.Ed.2d 420 (1966). The government has the

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[6] *State v. Sheehan*, 515 So.2d 670 (3d Cir. 1987), writ den., 519 So.2d 129 (La. 1988).

burden of establishing guilt solely on the basis of evidence produced in the courtroom and under circumstances assuring the accused all the safeguards of a fair trial. *U.S. v. Howard*, 506 F.2d 865, 867-68 (5th Cir. 1975). The defendant's rights to a fair trial, confrontation, cross-examination, and counsel are offended when prejudicial extrinsic evidence before the jury comes from a third party or from a juror. *Howard*, 506 F.2d at 868, and cases cited therein.

However, it is not required that the jurors be totally ignorant of the facts and issues involved in a case. The mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is insufficient to rebut the presumption that a prospective juror is impartial if the juror can lay aside his or her impression and render a verdict based on the evidence presented in court. *De La Rosa*, 743 F.2d at 1379, quoting *Irvin v. Dowd*, 366 U.S. 717, 722-23, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961).

A juror is presumed to [sic] biased when he or she is apprised of such inherently prejudicial facts about the defendant that the court deems it highly unlikely that the juror can exercise independent judgment, even if the juror declares to the court that he or she will decide the case solely on the evidence presented. *De La Rosa v. State of Texas*, 743 F.2d 299, 1379 (5th Cir. 1983), cert. den., 470 U.S. 1065, 105 S.Ct. 1781, 84 L.Ed.2d 840 (1985); *Willie v. Maggio*, 737 F.2d 1372, 1379 (5th Cir. 1984), cert. den., 469 U.S. 1002, 105 S.Ct. 415, 83 L.Ed.2d 342 (1984). A juror's verdict must be based upon the evidence developed at the trial. The scope of the discussion of the case among the jurors during their deliberations does not include

communication from one juror to another of objective extrinsic facts regarding the criminal defendant or his alleged crimes. *Howard*, 506 F.2d at 867. In *Howard*, 506 F.2d at 867-68, the Fifth Circuit stated that, in the *habeas* context, a defendant's right to a fair trial is violated when prejudicial extrinsic evidence, a report by one of the jurors that the defendant had been in trouble before, is placed before the jury.[7]

This issue, also, was raised in Sheehan's motion for a new trial. At the hearing on his motion for new trial[8],

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[7] In a similar context, with respect to media publicity, the news of a defendant's prior criminal record disclosed to a jury is considered "inherently prejudicial". *U.S. v. Gaffney*, 676 F.Supp. 1544, 1551-52 (M.D. Fla. 1987), citing *Murphy v. Florida*, 421 U.S. 794, 798, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1975). In *U.S. v. Williams*, 568 F.2d 464, (5th Cir. 1978), a case involving a direct appeal, the court, focusing on the degree and pervasiveness of the prejudicial influence, held that the exposure of two jurors to information regarding the defendants' convictions at the first trial on the same charges resulted in an unfair second trial and stated "we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged." Also, *U.S. v. Bass*, 10 F.3d 256, 260 (5th Cir. 1993); *U.S. v. Aragon*, 962 F.2d 439, 444 (5th Cir. 1992) ("Thus, at a minimum, references to [the defendant's] prior convictions constituted inherently prejudicial evidence. . . . It is innately prejudicial.").

[8] The testimony regarding the jurors' discussions of Sheehan's previous trial and conviction was made only under proffer because the trial judge was not sure if information received from another juror constituted information from an "extraneous source," as stated in Sheehan's motion for new trial (Ex. A, Vol. 8, p. 1665). However, it is clear that, although testimony regarding a juror's mental process may not be elicited, a juror may testify to any facts bearing upon the

Trimbur testified that he did not know about the prior conviction until the jury was deliberating on the final day of trial (Ex. A, Vol. 8, p. 1586-87). Juror Kathy Small, the alternate juror, testified that she heard someone mention, in the jury room, that Sheehan had been tried before, but did not say the outcome of the trial (Ex. A, Vol. 8, pp. 1626 & 1635); this occurred before the jury deliberations, from which Small was excluded (p. 1634). Juror Terry Taylor testified at the hearing that she found out during the trial, from at least two conversations in the jury room, and particularly from statements by Juror David Gauthier, that Sheehan had been previously tried and convicted on the same charges for which he was then being tried (Ex. A, Vol. 8, pp. 1638-39). Taylor further testified that Juror Brunette Bordelon had told her that Bordelon's husband had read a newspaper article about the trial aloud to Bordelon during breakfast (P. 1641). Bordelon denied that her husband had read the article aloud to her or that she had read the article herself (Ex. A, Vol. 8, p. 1618); she was not asked whether she had heard any discussions concerning Sheehan's prior trial and conviction.

Since this is a *habeas* proceeding, the trial judge's factual findings are entitled to great deference, under 28 U.S.C. §2254. However, the trial judge held that, "assuming the jurors learned about the prior trial and conviction", "[juror] ignorance of a prior conviction of the same offense is not a constitutional right of a defendant" and

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question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. *U.S. v. Howard*, 506 F.2d 865, 868 (5th Cir. 1975).

that "it is speculative to assume that a juror would consider a conviction of the same offense in a prior case as evidence of guilt", noting that he had specifically instructed the jury to base its decision only on evidence presented at the trial (Ex. A, Vol. 8, pp. 1667-68). Since the trial judge's holding is based on erroneous conclusions of law, rather than factual findings, it is not entitled to deference by this court.

Only four jurors testified at the hearing and only three jurors were asked whether the jurors had discussed Sheehan's prior trial and conviction; of those three, all answered affirmatively. One of those three indicated that a fourth juror, David Gauthier, had also discussed the prior trial. The inference to be drawn from the testimony relating to the discussions in the jury room is that other jurors, also, took part in or heard those conversations. The facts of Sheehan's prior trial and conviction are prejudicial extrinsic information that should not have been considered by the jury. Compare, *U.S. v. Howard*, 506 F.2d at 867.

Therefore, Sheehan's right to a fair trial was clearly violated and I will recommend that Sheehan be granted *habeas* relief on this ground, also.

Ground No. 3 – Pretrial Publicity

Finally, Sheehan alleges he was prejudiced by the trial judge's denial of his motion for a change of venue, which was based on the extensive pretrial publicity surrounding his trial.

A person is not automatically rendered unqualified to serve as a juror merely because he has been exposed to media coverage of the charged crime. The issue becomes whether exposure to media publicity will preclude the exposed person from returning a verdict based solely on the person's application of the law as stated to the evidence presented. The trial court must decide this question after observing the demeanor and response of the prospective jurors and evaluating any possible prejudice. *U.S. v. Flores*, ___ F.3d ___, *8, 1995 WL 519993 (5th Cir. 1995). The trial court is the first and best judge of community sentiment and the indifference of the prospective juror. *Leichman v. Secretary, Louisiana Dept. of Corrections*, 939 F.2d 315, 316 (5th Cir. 1991). The trial court's factual findings are entitled to a presumption of correctness. 28 U.S.C. §2254(d); *Sumner v. Mata*, 449 U.S. 539, 545-47, 101 S.Ct. 764, 768-69, 66 L.Ed.2d 722 (1981). The Constitution does not require that jurors be completely unaware of the facts and issues to be tried. The *habeas* petitioner must show that the trial atmosphere was "utterly corrupted by press coverage." *Andrews v. Collins*, 21 F.3d 612, 632 (5th Cir. 1994), cert. den., ___ U.S. ___, 115 S.Ct. 908, 130 L.Ed.2d 790 (1995); *Black v. Collins*, 962 F.2d 394, 409 (5th Cir.), cert. den., 504 U.S. 992, 112 S.Ct. 2983, 119 L.Ed.2d 601 (1992).

The trial judge held a hearing on Sheehan's motion for a change of venue (as well as on other motions) (Ex. A, Vol. 1, pp. 81-144), at which testimony was given by the Avoyelles Parish coroner (pp. 83-89), the editor of the official journal for Avoyelles Parish (pp. 90-100), and a clinical psychologist (pp. 101-141). The trial judge denied the motion for a change of venue, finding that there had

been only factual, as opposed to inflammatory, media coverage of the case and that, although there was knowledge of the prior trial as a result of the media coverage, there was no prejudice to Sheehan (pp. 141-42).

The respondent points out that all thirteen of the jurors picked for trial had denied having any knowledge, or memory, of the crime charged or of Sheehan's prior trial. Sheehan does not deny this, but relies on his earlier argument that the jurors became aware of his previous trial, and discussed it, due to media publicity. However, that argument is addressed above. As to prejudice caused by pretrial publicity, the very fact that thirteen jurors were found which had no knowledge of the case demonstrates that Sheehan has failed to show the atmosphere was "utterly corrupted" by the pretrial publicity.

Accordingly, I will recommend that this ground for *habeas* relief be denied.

Conclusion

Based on the foregoing discussion, IT IS RECOMMENDED that the court find that Sheehan was denied his constitutional rights to a fair trial and an impartial jury and that Sheehan be GRANTED a conditional writ of *habeas corpus*, ordering his discharge from custody for his invalid conviction for second degree murder on April 30, 1988, in the 12th Judicial District Court, Avoyelles Parish, Louisiana, unless the State of Louisiana grants Sheehan a new trial within 60 days after the date of this Court's judgment.

Under the provisions of 28 U.S.C. § 636(b)(1)(c), the parties have ten (10) business days from service of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge before he makes a final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDINGS ON APPEAL.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this 3rd day of October, 1995.

/s/ John F. Simon
JOHN F. SIMON
UNITED STATES
MAGISTRATE JUDGE

APPENDIX 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JOHN ANTHONY SHEEHAN

-vs-

JOHN P. WHITLEY, WARDEN, ET AL.

CIVIL ACTION NO. 94-2249

SECTION "A" (JUDGE LITTLE)

JUDGMENT

(Filed Nov. 21, 1995)

Our judgment in this matter coincides with that reflected in the report and recommendation filed by the magistrate. We reach this conclusion after full record review, including the well reasoned and exhaustive brief filed on behalf of the State of Louisiana in opposition to the magistrate's report as well as the excellent briefs on behalf of the applicant.

It is the judgment of this court that John Anthony Sheehan is granted a conditional writ of habeas corpus. His discharge from custody for his invalid conviction for second degree murder on 30 April 1988, in the 12th Judicial District Court, Avoyelles Parish, State of Louisiana is conditioned on the failure of the State of Louisiana to subject John Anthony Sheehan to a new trial within 60 days after the date of this judgment.

Alexandria, Louisiana

21 November 1995

APPENDIX 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30008

JOHN ANTHONY SHEEHAN

Petitioner - Appellee

v.

JOHN P WHITLEY, Warden, Louisiana State Penitentiary; RICHARD P IEYOUB, Attorney General, State of Louisiana

Respondents - Appellants

Appeal from the United States District Court for the Western District of Louisiana, Alexandria

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 3/11/97, 5 Cir., 1997, F.3d)

(Filed Apr. 9, 1997)

Before JONES, DUHÉ, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and

Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States
Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX 6

I.O.P. – Suggestion for Rehearing En Banc

* * *

Handling of Petition by the Judges

Panel Has Control. Although a copy of the suggestion for rehearing en banc is distributed to each panel judge and every active judge of the Court, the filing of a suggestion for rehearing en banc does not take the case out of the plenary control of the panel deciding the case. A suggestion for rehearing en banc will be treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full court.

APPENDIX 7

STATE of Louisiana

v.

John Anthony SHEEHAN.

No. CR87-356.

Court of Appeal of Louisiana,
Third Circuit.

Nov. 4, 1987.

Rehearing Denied Dec. 9, 1987.

Writ Denied Feb. 5, 1988.

Defendant was convicted in the Twelfth Judicial District Court, Parish of Avoyelles, Harold J. Brouillette, J., of second-degree murder and appeal was taken. The Court of Appeal, Guidry, J., held that statements given by defendant serviceman to member of Air Force Office of Special Investigations during polygraph examination were made on basis of promise that statements would not be turned over to civilian authorities, and thus admission of statements violated defendant's Fifth and Sixth Amendment rights.

Reversed and remanded.

Lewis O. Unglesby, Unglesby & Heck, Baton Rouge, for defendant-appellant.

Jerold E. Knoll, Dist. Atty., David Lafargue, Asst. Dist. Atty., Marksville, for plaintiff-appellee.

Before GUIDRY, FORET and YELVERTON, JJ.

GUIDRY, Judge.

On August 5, 1986, defendant, John Anthony Sheehan, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1, in connection with the shooting death of his wife. At the time of the shooting, which occurred in the Parish of Avoyelles, John Sheehan was an enlisted member of the U.S. Air Force stationed at Eglin Air Force Base, Florida. Subsequent to his indictment, in connection with their own internal investigation and in cooperation with civilian authorities, the Air Force Office of Special Investigations (O.S.I.) caused a polygraph examination to be administered to Airman First Class Sheehan. The results of that examination, along with accompanying inculpatory statements, were turned over to the Avoyelles Parish Sheriff's Department. Defendant, by a motion to suppress which was heard and denied on October 31, 1986, sought to exclude certain inculpatory statements allegedly made to the O.S.I. officer who conducted the polygraph examination. On November 19, 1986, a jury of twelve, ten of whom concurred in the verdict, found the defendant guilty as charged. Defendant moved for a new trial. This motion, after hearing, was denied. Upon waiving all delays, defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. Defendant now appeals his conviction based on the following four assignments of error:

> 1. Trial court erred in admitting statements made by the defendant and failing to suppress statements made by the defendant, and in denying the motion to suppress the said statements.
>
> 2. Trial court erred in that the evidence is insufficient to justify the verdict, and erred in

failing to grant a new trial based on the insufficiency of the evidence.

3. Trial court erred in that the absence of the transcript prohibits the defendant from intelligently asserting his appellate rights, from properly perfecting assignments of error, and from briefing to this court the issue of sufficiency of the evidence required by Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, and State v. Thetford, 445 So2d 128.

4. Trial court erred in failing to grant a new trial based on the defects in jury selection and the admissibility of inadmissible statements and opinions made by various witnesses.

Assignment of error number four was not briefed on appeal and is considered abandoned. *State v. Dewey,* 408 So.2d 1255 (La.1982). As we find merit to assignment of error number one, assignments of error numbered two and three will not be addressed.

FACTS

Defendant-appellant, John Anthony Sheehan, and the victim, Monica Jeansonne Sheehan, were married in Louisiana in May 1984, upon Monica's graduation from high school. Following their marriage, the couple moved to Florida where the defendant was stationed with the U.S. Air Force. During the first year or so of their marriage, the couple had marital problems which resulted in bruises to Monica on several occasions and a hospital visit once. On one occasion, appellant allegedly said he hated her so much he could just kill her and slammed her against the wall. The couple

received marriage counseling at the suggestion of John's superiors and, according to defendant, they resolved their marital problems. Subsequently, on September 3, 1985, Monica gave birth to a son with the assistance of the appellant in the hospital as her "Lamaze Coach".

The record reflects that in June 1984, a John Hancock agent solicited and sold defendant a $25,000.00 insurance policy on the life of Monica Sheehan. On April 17, 1986, the defendant sought additional insurance on the life of Monica Sheehan from the same agent, allegedly for the purpose of equalizing coverage for both spouses in light of his military insurance coverage. A policy of variable insurance with $50,000.00 coverage was taken insuring the life of Monica. Mrs. Sheehan was present during the negotiations and in the application stated no other insurance was pending or contemplated. Coverage was immediate through the execution of a military pay allotment form executed by the defendant. The following week, on April 23, 1986, defendant contacted a State Farm life insurance agent about obtaining additional insurance. At the State Farm office, appellant completed an application for a variable life policy providing $75,000.00 coverage on the life of each spouse and $10,000.00 coverage on the life of the couple's infant son. In the application, he stated no other applications for life insurance were pending with other companies. When the agent inquired as to when Monica could come in to sign the form and indicate her choice of final beneficiary, defendant explained it was difficult for his wife to come in and suggested he take the application home for her to complete. The agent agreed to this and the next morning

defendant returned the completed form along with $88.00 in cash, putting the policy into effect immediately. The defendant signed Monica's name on the application, however, he made no attempt to duplicate Monica's signature.

The victim and defendant traveled to Zachary, Louisiana, on April 29, 1986, where they spent the night at the victim's mother's house enroute to a wedding of one of Monica's friends. The next morning they drove to Plaucheville, Avoyelles Parish, Louisiana, to the defendant's grandparents' home to visit. Sometime after their arrival, the defendant allegedly began to clean his grandfather's shotgun, by wiping the exterior with an oily rag. The victim was seated, cross-legged, on the den floor playing a game when the shotgun discharged. She was struck in the upper left chest area with the pellets traveling in a sixty to seventy degree angle and exiting the middle of her back. The defendant's grandmother, who was in the kitchen (the kitchen and den were separated by a bar rather than a wall) sent John to find his grandfather and telephoned for help. Mrs. Marks, the grandmother, was present when the ambulance arrived, but John did not return until afterwards.

The two nurses who responded to the call testified that they found the victim dead on the floor with two green unspent shotgun shells on the floor next to the body and a red spent shell several feet away. Detective Robert Venable of the Avoyelles Parish Sheriff's Deparment, [sic] who arrived at the scene sometime later, testified that he removed one spent red shell and one unspent red shell from the pump action

shotgun. He found no spent shell on the floor, only the two green unspent shells. At trial, Mrs. Marks testified that there were four unspent green shotgun shells on the bar when the couple arrived and that the baby had played with two of them on the floor. She could not account for the whereabouts of the other two shells.

Detective Venable testified that, following Monica's death, some members of her family contacted him to express suspicion of foul play and to relate the Sheehans' history of marital discord. He stated that he also received a call from one of the non-commissioned officers who worked with the defendant at Eglin expressing concern that a person like John, who was very familiar with firearms, could be involved in such an accident. These expressions of suspicion and concern prompted further investigation by Venable. He testified that, during that investigation, he contacted the O.S.I. at Eglin Air Force Base where he spoke with Larry Brown and Agent Jerry Adams to request their cooperation. The O.S.I. agents agreed to cooperate and apparently began their own independent investigation in cooperation with the civilian authorities.

On August 5, 1986, defendant, John Sheehan, was indicted by a grand jury. On Thursday, August 14, 1986, he was arraigned in Marksville, Louisiana, and upon joint motion of the defense and the State, was granted permission to return to active duty at Eglin pending trial. That very same day, unknown to Sheehan, O.S.I. Special Agent Joseph H. Walker, U.S.A.F., contacted Detective Venable to inquire if the Avoyelles Parish Sheriff's Office would have any objection to his administering a polygraph

examination to Sheehan. Detective Venable informed Agent Walker that neither he nor his department objected to such an examination. Testifying at the motion to suppress, Detective Venable denied that any agreement was reached that the results of the examination or any statement secured by Agent Walker would be turned over to the civilian authorities, but Detective Venable did travel to Eglin Air Force Base on Monday, August 18, 1986, and was present in the O.S.I. building when Sheehan was questioned and the test administered. At the hearing on the motion to suppress, Detective Venable testified as follows:

"Q. And I take it you were not present during the polygraph exam?

A. No I wasn't.

Q. How long after . . . or did you speak to Mr. Walker after the examination and subsequent interview of Mr. Sheehan?

A. Yes I did.

Q. And where did that conversation take place?

A. In the OSI detachment office at England [sic] Air Force Base.

Q. Did someone contact you and tell you that the interview was over and you could come over, or you should go over or something of that nature, or did you just show up?

A. I was already there.

Q. And you decided . . . you were where on the base or on [sic] the building?

A. I was at England [sic] Air Force Base OSI detachment.

Q. And did you contact Mr. Walker or did he contact you after the interview?

A. He was there and we spoke.

Q. Who contacted whom?

A. Well I was in the room and he walked into the room.

Q. Alright [sic] and what was the nature of the conversation after that?

A. He didn't have that much to say to me. He indicated that he couldn't turn this over to me, that it would be turned over to Agent Adams, who in turn at his discretion turned it over to me since I had originally asked for a joint investigation.

Q. Mr. Walker told you he couldn't turn it over, but he would give it to Mr. Adams and if Mr. Adams wanted to he could, is basically correct?

A. Basically correct.

Q. And Mr. Adams in fact did turn it over to you?

A. He did.

BY MR. JOHNSON:

Thank you very much detective."

Airman First Class Sheehan was first summoned to the O.S.I. office at approximately 9:00 a.m., Monday, August 18, 1986, under the guise that, because of his indictment in Louisiana, his security clearance was in

danger of being revoked. Agent Walker described his first meeting with Sheehan as follows:

> "A. I identified myself to him and told him I was a polygraph examiner and told him I was somewhat familiar with what had been alleged, that he may have been responsible for his wife [sic] shooting death, and I was there to give him a polygraph examination. If he was being truthful about the matter I could very easy [sic] clear him of it as far as the government would be concerned he would probably be able to retain his security clearence [sic], and they would remove any order of suspicion that might be within the Air Force at that time. After talking for twenty or thirty minutes he said he thought it would be a good idea, but he would like to talk to his attorney first.
>
> Q. O.K. did he tell you who his attorney was?
>
> A. Yes he did and he attempted to call his attorney that morning."

Sheehan was unable to reach his attorney, Mike Johnson, at that time. He was told to keep trying and report back to Agent Walker at 11:00 a.m. Upon reporting back, Sheehan had been unable to reach his attorney and it was requested that further efforts be made. Shortly after 11:00 a.m., defendant finally reached his attorney, spoke with him, and then, pursuant to his attorney's request, handed the telephone to Agent Walker. The record reflects the following colloquy between Agent Walker and defense counsel at the hearing on the motion to suppress:

"Q. Now, you indicated that you called me or he called and you got on the phone with me is that correct?

A. That's correct.

Q. And I asked you . . . tell me again what did I ask you exactly?

A. I explained to you at first who I was and identified myself. That I was a polygraph examiner with the Air Force Office of Special Investigations, and that I would like to give Mr. Sheehan a polygraph examination.

Q. Did I ask you the purpose of that polygraph examination?

A. I don't remember if you asked me or I volunteered it.

Q. That it was for his security clearance, is that correct?

A. Not security clearance, I told him his security clearance was being withdrawn because of the suspicion surrounding the facts of the shooting.

Q. Did I not ask you sir is this strictly internal for the military and you responded yes?

. . . .

A. You asked me if I was working for the district attorney and I responded no.

Q. Or the sheriff's office?

A. And I said no.

Q. And I said will any of this material be turned over to the civilian authorities, and you said no?

A. And I said . . . that's correct.

Q. But that proved not to be true huh?

A. Yes sir."

Following their conversation, and based upon the assurance of Agent Walker that his client's subjection to a polygraph examination was solely for military purposes and that nothing obtained as a result of the test would be turned over to the civil authorities, defendant's counsel advised his client to proceed with the examination. At that point, Sheehan was given his rights under Article 31 of the Uniform Code of Military Justice which are similar to *Miranda* rights.

Agent Walker testified as follows concerning three questions he asked the defendant during the polygraph examination:

> "A. I asked him did you look into the chamber of that shotgun before you began cleaning it, and he answered no. Did you load that shotgun before you started cleaning it, he answered no, and did you deliberately point that shotgun at Monica and he also answered no."

At the conclusion of the polygraph examination, a conversation ensued between Agent Walker and Sheehan, which Agent Walker described as follows:

"BY MR. WALKER:

> . . . I told Mr. Sheehan that I felt he was being untruthful about all three questions and at which point in time he requested to speak to his attorney.

Q. So at that time he wanted to talk to Mr. Johnson again, is that correct?

A. That's correct.

Q. Alright [sic] and what happened then?

A. I terminated my interview and allowed him to call Mr. Johnson.

Q. Did he call Mr. Johnson?

A. Yes he did.

Q. And did he speak with Mr. Johnson?

A. I know he called . . . he said he called Mr. Johnson and when I saw that I felt he had Mr. Johnson on the line I stepped outside the room, so that he may have some privacy. After about four or five minutes he came outside and told me he had completed his conversation with Mr. Johnson and he was ready to proceed with any further testing or the interview.

Q. O.K. so then when he came back in and told you he was ready to proceed with the interview, could you tell us then whether or not then there was any further rights that was given to him at that time?

A. Not at that time.

Q. Alright [sic] then after the discussion was there any occasion then to take a statement from him? [written]

A. After about thirty minutes or so I did take a statement from him."

Defendant was given his *Miranda* rights before the written statement was taken.

ASSIGNMENT OF ERROR NO. 1

Defendant claims that the statements he made to Air Force Special Agent Joseph Walker, O.S.I., which were admitted in evidence over objection, were involuntary in that they were made in reliance on false promises and, therefore, appellant was denied his rights under the Fifth and Sixth Amendments to the United States Constitution. In support of his contention that the trial court erred in admitting these statements, the defendant relies on the promise made by Agent Walker to his counsel that nothing obtained as a result of the polygraph test would be turned over to the civilian authorities. We find merit in this contention.

" . . . [C]ourts are constitutionally bound to assure that those accused before our courts are tried in accordance with law and to reverse, where substantial error of law is committed." *State v. Butler,* 322 So.2d 189 (La.1975). It is well settled that the rules governing the admissibility of inculpatory statements are the same as those which apply to the admissibility of confessions. *State v. McGraw,* 366 So.2d 1278 (La.1978); *State v. Thompson,* 399 So.2d 1161 (La.1981). Before a confession or inculpatory statement can be introduced into evidence, the state has the burden of affirmatively proving that it was freely and voluntarily given, and not made under the influence of fear, duress, intimidation, menaces, threats, *inducements or promises.* La. C.Cr.P. art. 703(D); La. R.S. 15:451; *State v. Thucos,* 390 So.2d 1281 (La.1980); *State v. Thompson,* supra; *State v. Vaccaro,* 411 So.2d 415 (La.1982); *State v. Green,* 443 So.2d 531 (La.1983).

Clearly in the instant case, defendant's statements were made based upon inducements and promises to both defendant and his attorney that "nothing" would be turned over to the civilian authorities. The record reflects that Agent Walker, as a member of the Air Force Office of Special Investigations, was working in concert with Detective Venable of the Avoyelles Parish Sheriff's Office. In our view, any misconduct on his part is akin to misconduct by any civilian law enforcement officer. It is logical to assume, based upon the record evidence, that if Agent Walker had revealed to defendant's counsel that he and other agents of the O.S.I. were cooperating with the civilian authorities in the investigation of Monica Sheehan's death and that, at that very moment a deputy from Avoyelles Parish was waiting for any evidence the examination would provide, defense counsel would have advised his client not to take the polygraph and not to make any statements. We conclude that Agent Walker's and Detective Venable's actions clearly deprived the defendant of his rights under the Fifth and Sixth Amendments to the United States Constitution. For these reasons, we find that the trial court erred in denying defendant's motion to suppress and in admitting, over objection, the inculpatory statements made by defendant to Agent Walker.

We next consider whether this error requires reversal of defendant's conviction. To determine whether or not the error committed herein substantially affected the outcome of defendant's trial or was harmless, we look to *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) wherein the U.S. Supreme Court stated "before a federal constitutional error can be held harmless, the

court must be able to declare a belief that it was harmless beyond a reasonable doubt". This standard was adopted by the Louisiana Supreme Court in *State v. Gibson*, 391 So.2d 421 (La.1980). Additionally, La. C.Cr.P. art. 921 provides that "[a] judgment . . . shall not be reversed . . . because of any error . . . which does not affect substantial rights of the accused".

The record reveals that the guilty verdict was a 10 to 2 decision. Our review of the entire record does not enable us to determine what persuaded the jurors one way or another. The testimony at trial of Agent Walker covered approximately 20 pages of transcript and gave the appearance that the statements made by the defendant to him were freely and voluntarily given. The statements were inculpatory in that defendant allegedly admitted to Agent Walker that he knew there were shells in the gun while it was being cleaned and that while cleaning the gun, he pointed it at Monica, not to shoot her with it, but to line the shotgun up with her as she sat on the floor in front of him. We are unable to conclude that the testimony by Agent Walker and the written statement admitted in conjunction therewith were harmless beyond a reasonable doubt. We find that there exists a more than reasonable doubt that such evidence may have contributed to Sheehan's conviction, thus substantially affecting his rights.

Accordingly, for the reasons stated, the defendant's conviction is reversed, his sentence is vacated and the case is remanded to the district court for a new trial excluding the oral and written statements given by Sheehan to Agent Walker and any testimony by Agent

Walker concerning said statements or the events which took place August 18, 1986, at Eglin Air Force Base.

REVERSED AND REMANDED.

APPENDIX 8

STATE of Louisiana

v.

John Anthony SHEEHAN,

No. 88-K-0033.

Supreme Court of Louisiana.

Feb. 5, 1988.

In re State of Louisiana; applying for writ of certiorari and/or review; to the Court of Appeal, Third Circuit, No. CR87-0356; Parish of Avoyelles, 12th Judicial District Court, Div. "B", No. 60622.

Prior report: La.App., 515 So.2d 670.

Denied.

APPENDIX 9

STATE of Louisiana

v.

John Anthony SHEEHAN,

No. 88-OK-2640.

Supreme Court of Louisiana.

Nov. 18, 1988.

In re Sheehan, John Anthony; – Defendant(s); applying for writ of certiorari and/or review; to the Court of Appeal, Third Circuit; Parish of Avoyelles, 12th Judicial District Court, Div. "B", No. 60622.

Granted. Remanded to the district court for an evidentiary hearing on the motion for a new trial because of newly discovered evidence.

APPENDIX 10

STATE of Louisiana, Plaintiff-Appellee,

v.

John Anthony SHEEHAN, Defendant-Appellant.

No. CR88-1193.

Court of Appeal of Louisiana,
Third Circuit.

March 14, 1990.

Following remand from 515 So.2d 670, defendant was again convicted by jury of second-degree murder before the 12th Judicial District Court, Parish of Avoyelles, Harold J. Brouillette, J., and he appealed. The Court of Appeal, Yelverton, J., held that: (1) circumstantial evidence was sufficient to find beyond a reasonable doubt that every reasonable hypothesis of innocence had been excluded, and that defendant had specific intent to kill or inflict great bodily harm on victim; (2) statements jurors gave on voir dire did not prevent defendant from getting a fair trial and did not amount to a denial of defendant's right to intelligently exercise his peremptory challenges; and (3) defendant was not entitled to grant of change of venue.

Affirmed.

Lewis O. Unglesby, Baton Rouge, Rodney M. Rabalais, Marksville, for defendant-appellant.

J. Edward Knoll, Dist. Atty., Marksville, for plaintiff-appellee.

Before DOMENGEAUX, C.J., and GUIDRY and YELVERTON, JJ.

YELVERTON, Judge.

John Anthony Sheehan has been twice convicted by Avoyelles Parish juries of second-degree murder, a violation of La.R.S. 14:30.1, for the April 30, 1986, shooting death of his wife. On appeal from the first conviction this court reversed, 515 So.2d 670, because of a due process violation. In April 1988 Sheehan was again convicted, and it is from the second conviction that the present appeal is taken.

Defendant raises eight assignments of error. Two were expressly abandoned. Of the remaining six, the first involves sufficiency of the evidence to convict under the *Jackson v. Virginia* standard. The others are the alleged disqualification of a juror emanating from the juror's responses on voir dire, alleged improper communications to the jurors during deliberations, denial of a motion to change venue, and the refusal of the trial court to permit a certain witness to testify on a remand to hear newly discovered evidence. We find that the evidence was sufficient to convict. We find that none of the remaining assignments of error have merit. We affirm the conviction.

ASSIGNMENT OF ERROR NO. 1:

This assignment relates to the sufficiency of the evidence. At the trial, the only disputed element of the offense of second-degree murder was whether the defendant had the specific intent to kill or inflict great bodily harm.

On April 30, 1986, defendant fatally shot his wife, Monica, with a 12-gauge pump shotgun. He was sitting in a chair holding the shotgun loaded with buckshot. It was pointed at his wife, who was sitting on the floor, when it fired. The victim sustained one shotgun blast in her heart.

Sheehan and his wife, along with their eight month old son, lived in Crestview, Florida. They came home to Louisiana for a visit in order to attend the wedding of one of Monica's friends. The first night home they stayed with Monica's mother in Zachary, Louisiana. The next morning they drove to Dupont. It was there, in the home of Sheehan's grandparents, Robert and Lillian Marks, that the shooting occurred.

Sheehan and Monica had been married less than two years. They had marital problems from the start. There was evidence of physical abuse. Monica was bruised several times and went to the hospital once. Sheehan told people that he did not love Monica and that he wished he had not married her. Monica's stepfather testified that the defendant told him that he did not love the deceased and would do anything that it took to get her out of his life.

Shortly after the marriage, or nearly two years before Monica's death, a John Hancock agent solicited and sold defendant a $25,000 insurance policy on Monica's life. On April 17, 1986, thirteen days before his wife's death, Sheehan solicited and obtained a $50,000 policy on Monica's life from the same agent. This application stated that no other insurance was pending or contemplated. On the same day the defendant delivered a military allotment to the agent, making the $50,000 coverage effective immediately.

Six days later, on April 23, 1986, which was one week before Monica's death, Sheehan contacted a State Farm Life Insurance agent about obtaining additional insurance on Monica's life. An appointment was made for 4:30 p.m. the next day, April 24. At the State Farm office for the appointment, appellant completed an application for a variable life policy providing $75,000 coverage on the life of each spouse and $10,000 coverage on the life of the couple's infant son. Sheehan took the application home with instructions to get his wife's signature. Early the next morning, April 25, he brought the application back. It was signed with Monica's name. He produced $88 in cash for the first two monthly premiums, in order to obtain immediate coverage. In the application, he stated no other applications for life insurance were pending with other companies.

It was stipulated at trial that defendant signed his wife's name on the State Farm application. The defendant was named primary beneficiary on all policies on the life of his wife.

The defense in the case was that the defendant was cleaning the shotgun and the shooting occurred accidentally. The defendant allegedly began to clean the shotgun by wiping the exterior with an oily rag. The victim was seated, cross legged, on the den floor playing a game. The defendant's grandmother, Mrs. Marks, was in the kitchen when the shotgun discharged.

There was expert testimony given at trial by a pathologist, based on trajectory calculations and the defendant's version of the physical position of himself,

the gun, and his wife, that the shooting could not have occurred the way the defendant said it did.

Right after the shooting, defendant's grandmother ran from the kitchen into the den. She saw Monica lying on the floor and telephoned the operator for help. She also sent the defendant out to try to find some help and then she telephoned a nearby nursing home requesting assistance from that source. In response to this call two nurses and an ambulance driver arrived.

The two nurses testified that they found the victim dead on the floor. They saw on the floor two green unspent shotgun shells and a red spent shell near the body. The defendant did not return to the house until after the nurses got there.

Detective Robert Venable of the Avoyelles Parish Sheriff's Department arrived at the scene later. He testified that the only shells on the floor when he got there were the two green unspent shells. The weapon was on the sofa. He found and removed one spent red shell from the gun's chamber and he found one unspent red shell in the magazine. He found no spent shell on the floor, only the two green unspent shells. Detective Venable testified that the weapon was a pump shotgun which required deliberate action to eject a fired shell from the barrel, and that moving the slide forward again takes a shell from the magazine and puts it in the chamber. The defendant was present in the room with the gun after the nurses left and before Detective Venable arrived. Mrs. Marks, defendant's grandmother, testified at trial that when the couple arrived that morning there were four unspent green shotgun shells on the bar (between the kitchen and the den),

and that the baby had played with them and dropped two of the shells on the floor. According to the evidence the defendant was the only person who handled the gun.

The defense was that the killing was an accident, and that the evidence was insufficient to exclude every reasonable hypothesis of innocence. The defendant urges that the explanation that he was cleaning the gun and it went off is a reasonable hypothesis. For this hypothesis he argues that there was testimony that the defendant's grandfather sometimes left the gun loaded. Defendant points to the facts that the insurance purchased did not provide for double indemnity, and that it was for whole life coverage rather than term. He argues the remoteness and insignificance of the marital problems as having a bearing on motive. A forensic scientist testified on defendant's behalf offering an accident explanation of the shooting.

The disputed element of second-degree murder in this case is whether the defendant had a specific intent to kill or to inflict great bodily harm, as required by the statute defining the crime, La.R.S. 14:30.1, and the definition of specific criminal intent, in La.R.S. 14:10(1). Specific intent is a state of mind and need not be proven as fact, but may be inferred from the circumstances of the transactions and actions of the defendant. *State v. Boyer,* 406 So.2d 143 (La.1981). Specific intent is an ultimate legal conclusion to be resolved by the factfinder. *State v. Graham,* 420 So.2d 1126 (La.1982).

Because the state relied in large part on circumstantial evidence to convict, our standard of appellate review

must comply not only with the familiar standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), but also with La.R.S. 15:438, which requires that the proof must exclude every reasonable hypothesis of innocence. Proof of specific intent, and the exclusion of any reasonable hypothesis of innocence, could rationally and beyond a reasonable doubt be found in the circumstances of this offense: multiple purchases of insurance policies coincidentally with plans for a trip to Louisiana, the gun cleaning, the manipulation of shotgun shells, the medical probabilities. We find that a rational trier of fact, viewing all of the evidence in a light most favorable to the prosecution, could have concluded beyond a reasonable doubt that every reasonable hypothesis of innocence had been excluded, and that there existed a specific intent to kill or inflict great bodily harm on the victim.

This assignment of error has no merit.

ASSIGNMENT OF ERROR NOS. 2 & 3:

These assignments claim error in failing to grant a new trial based on allegations that a juror gave false statements on voir dire. Defendant claims that these false statements prevented him from getting a fair trial, and amounted to a denial of his right to the intelligent exercise of peremptory challenges.

The juror was David Trimbur, the last one selected. Trimbur, an ordained Baptist minister for 25 years, was pastor of the Marksville Baptist Church, the parish seat in Avoyelles Parish, where the case was tried. His voir dire focused mainly on his status as a minister of religion. Following a relatively brief voir dire he was selected by both sides and sworn as a juror. During the voir dire it

was revealed that he knew the district attorney, he knew Detective Venable of the Avoyelles Parish Sheriff's Office, and he knew the two local defense attorneys, Tucker L. Melancon and Rodney M. Rabalais. In fact, Reverend Trimbur's wife was employed by a firm owned by Tucker L. Melancon and his brother. He was asked specifically if his status as a well-known Baptist preacher in the area would affect his ability to serve on the jury, and he declared that it would not. His voir dire responses included statements that he knew nothing about the case, had talked to no one in the sheriff's office about it and especially Detective Venable, and that he had no relationship with anyone involved that would keep him from being a fair and impartial juror. He was asked three times – by the presiding judge, the district attorney and voir dire counsel for the defendant – whether there was anything that would keep him from being fair and impartial, and he responded each time that there was not. On the subject of his acquaintance with Detective Venable, a witness in the case, he revealed that he had performed the marriage ceremony for Venable and his wife, and had seen them in his church from time to time, and also once or twice on a social basis. He explained, however, that he was not really that close to Venable, and again reiterated that this acquaintance would not prevent him from being a fair and impartial juror. As stated earlier, he was selected at the end of his brief voir dire by both sides. He was the foreman of the jury.

After conviction, the defendant moved for a new trial, on the grounds that Reverend Trimbur had falsely answered questions on voir dire with respect generally to his relationship with the sheriff's department in

Avoyelles Parish and specifically with respect to his relationship with Detective Venable. The trial court granted a hearing on the application for a new trial and testimony was adduced, including further testimony by Reverend Trimbur. On voir dire Reverend Trimbur had been asked, "Are you or any member of your family, or close friends, employed by the District Attorney's Office, or by the Sheriff's Office?" To this he responded "No, sir." At the new trial hearing counsel for defendant, noting that Reverend Trimbur had been for some time an auxiliary deputy with the sheriff's office, questioned him as to why he responded on voir dire that he was not employed by the sheriff's office. Reverend Trimbur explained that he had forgotten that once, back in 1987, he was paid thirty-eight dollars for a night when he sat with an inmate in a hospital. He said he had listened to the trial court's instructions at the beginning of the voir dire informing the jury panel that a minister of religion could claim an exemption, as could a member of paid fire or police departments, and this instruction was fresh in his mind when he was asked whether he was employed by the sheriff's office. He explained that his involvement with the department was minimal, and that he regarded himself and was looked upon there more as a chaplain than as a policeman. Since he accepted, for civic reasons, his responsibility to serve on the jury even though he had the right to claim an exemption on account of being a minister of religion, he attached no significance to the fact that he was an unpaid auxiliary deputy, and believed that if it was important, the attorneys would bring it up.

Following this hearing the trial court denied the motion for a new trial. On the subject of Reverend Trimbur's "auxiliary" status, the trial judge in reasons for judgment said:

> The factors which show him to be in the law enforcement community are that he had a uniform; he occasionally went on patrol with paid deputies; he had a badge; and he had a firearm. The factors which suggest that he was not truly a law officer are that he never made an arrest; he never interrogated a witness; he never used his firearm and never had firearm training; and he never participated in any investigation. While he did not have the title of chaplain, he considered his position to be essentially that. He counseled deputies; he counseled prisoners in the jail; he conducted prayer services when a deputy died in a plane crash.
>
> The testimony of Rev. Trimbur depicts, in the court's opinion, a very civic-minded individual who wanted to be a good citizen and to participate in civic activities. In voir dire by defendant's counsel, when asked why he did not avail himself of his exemption as a minister, he answered as follows:
>
> > 'Because I'm not just a member or servant of my church; I'm a member of my community; and I feel strongly an obligation in my community.'

Concerning Reverend Trimbur's relationship with Detective Venable, the trial court said:

> It should also be pointed out that in spite of Trimbur's testimony that he knew Detective

Robert Venable, that he had performed his marriage, and that he had talked to him the day before he was selected as a juror, the attorneys for the defendant nevertheless decided to accept him as a juror. It may be speculation to conclude that his service as an auxiliary deputy, especially considering his vocation and his activities in that capacity, would have resulted in a challenge either peremptorily or for cause.

The entire voir dire conducted by defense counsel with reference to Venable was as follows:

Q. Let me ask you some names and see if you know these folks.

A. Yes sir.

Q. Detective Robert Venable with the Sheriff's Office?

A. Yes sir.

Q. And how do you know Detective Venable?

A. I performed his wedding a year and a half ago.

Q. All right. And, did you have to – when I got married, I met with the preacher in advance, and he kind of counseled you and stuff, did you do any of that, or did you just do the ceremony?

A. I just did the ceremony.

Q. All right. Do you know his wife?

A. Yes, I did.

Q. Was she a member of your congregation, or he?

A. She was. That was in Evergreen.

Q. All right, have you had any contact with him since that time?

A. I saw him yesterday for a few minutes in the hall, and I asked him about his marriage.

Q. Other than that?

A. No sir. Not really.

The defendant now contends that Trimbur was involved in giving extended marital advice to Venable contrary to what Trimbur indicated on voir dire. This was later denied by Trimbur and the record supports that denial. In fact, Trimbur was not even aware at the time of the trial that Venable and his wife were separated and living apart.

After the current appeal was taken, the defendant, alleging newly discovered evidence, moved for a remand to reopen proceedings on the motion for a new trial. In an affidavit attached to the motion for a remand, it was stated evidence had surfaced which would show that prior to trial Reverend Trimbur had sought advice from an attorney on how to answer questions if called as a potential juror, whether to disclose his status as an auxiliary deputy, and the possible consequences if it was known that he was an auxiliary deputy. The affidavit further declared that the newly discovered evidence would show that Reverend Trimbur made a conscious effort prior to trial to insure that he would serve on the jury and consciously avoided disclosure of information which was important to the defense.

At the hearing on remand regarding these serious allegations, Trimbur was again called to testify, as was Claire Sharp, an attorney in Marksville who was also a member of Trimbur's congregation. An examination of their testimony reveals that it does nothing at all to support the allegations contained in the affidavit. On the contrary, their testimony emphasizes that Trimbur at all times demonstrated no more and no less than a citizen's interest in his responsibility and duty respecting jury service. The trial judge again denied a new trial.

As was stated in *State v. Ballard,* 337 So.2d 481 (La.1976), there is no prohibition against jury service by an unpaid volunteer who peripherally and occasionally assists in law enforcement. Such service on a criminal jury, however, must be scrutinized closely. The same rules appear in *State v. Chapman,* 410 So.2d 689 (La.1982).

We have examined this record closely and find that there is nothing in it, nor in the nature of Trimbur's function with the sheriff's office, which would disqualify him from service on the jury. It is apparent that he was a clergyman first, and an auxiliary deputy second. His responses on voir dire were not misleading, and did not conceal any information. His relationship to the sheriff's office, as well as his relationship with Detective Venable, were not such as could be expected to destroy the otherwise impartial attitude of this juror. Trimbur was subjected to intense interrogations in an effort to prove specific facts showing such a close connection to the sheriff's office and Detective Venable that bias for the prosecution should be presumed. Trimbur's consistent responses in the record reflect his voir dire commitment

to fairness and impartiality. Nothing he said at the hearings supported a finding of bias, actual or implied. What comes across most strongly in the record of all three examinations – the voir dire, the new trial hearing, and the remand hearing – is his relationship with the community and its citizens in his capacity as a minister of religion. He neither sought nor avoided jury duty. He answered every question candidly and without rancor, openness characterizing his every response. Only by a strained manipulation of his words can bias be wrung from his testimony. We agree with the trial court.

We find no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 4:

By this assignment of error, defendant contends that knowledge that the defendant had been previously tried and convicted was obtained by one of the jurors and then passed on to the other jurors, and considered by them in their deliberations.

At the new trial hearing Terri Taylor, who was one of the two jurors who voted not guilty, testified that she heard about the first trial and conviction at a church service one night during the trial. She denied passing this information on to the other jurors, but she testified that she heard the matter discussed by other jurors during the trial. Because this testimony of Terri Taylor related to jury misconduct, and not as an unauthorized communication by a third person, the trial court sustained the state's objection to her testimony.

At the time of trial, La.R.S. 15:470 (now repealed and replaced by La.C.E. art. 606) was the statutory law applicable. This statute read:

> **Art. 606. Disqualification of juror as witness**
>
> **A. At the trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.
>
> **B. Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether any outside influence was improperly brought to bear upon any juror, and, in criminal cases only, whether extraneous prejudicial information was improperly brought to the jury's attention. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

This statute has been found to preclude evidence of juror misconduct, but not to preclude evidence of misconduct of a third person. *State v. Marchand,* 362 So.2d 1090 (La.1978). If this testimony of Mrs. Taylor is treated as evidence of juror misconduct, it was inadmissible. If the

testimony is treated as evidence of an unauthorized communication resulting from misconduct of a third person (at the church meeting), and therefore admissible, it nevertheless offended no substantial rights of the defendant, for two reasons: first, Mrs. Taylor testified that she did not pass the information on and, second, she voted for an acquittal.

This assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 5:

This assignment complains of the failure to grant a change of venue. Defendant complains that a fair and impartial trial could not be obtained in Avoyelles Parish because of the notoriety of the case including public knowledge of the first trial and the overturned conviction.

La.C.Cr.P. art. 622 provides the grounds for a change of venue as follows:

> A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.
>
> In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial.

At the hearing on the motion defendant called three witnesses. Dr. F.P. Bordelon testified that he was a witness at the first trial, and that he heard a lot of talk about the case then, but that he had not heard much about it since then: "Nobody has said anything in the last year that I know of. . . . " The second witness was Marion Gremillion, editor of The Weekly News, the official journal of Avoyelles Parish. She was familiar with media coverage of the first trial. The coverage was basic type reporting. The third witness was Marc Zimmerman, a clinical psychologist. He conducted two polls to determine public awareness of the case and also to determine the ability to put aside knowledge of the case. Half of those polled knew nothing about the case. Thirty-five percent of those polled on the second question believed they could put aside whatever knowledge they had.

We agree with the trial court that the defendant failed to meet his burden of proof that a fair and impartial trial could not be obtained in Avoyelles Parish. This conclusion is further supported in the record by the ease with which a jury was selected. The voir dire was conducted as to each prospective juror individually, and a jury and an alternate were selected out of the first 46 jurors called for voir dire examination.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 8:

By this assignment of error, defendant contends that the trial court erred in refusing to allow him to call Tucker Melancon, one of his two local attorneys in the case, as a witness at the hearing on remand.

The case was remanded, as pointed out earlier in a discussion of assignments of error Nos. 2 & 3, in order to hear defendant's allegedly newly discovered evidence. The newly discovered evidence was set forth in an affidavit supporting the motion for a remand. The remand, necessarily, was limited to the scope of the newly discovered evidence as stated in the affidavit. The testimony of Melancon was not newly discovered evidence, had nothing to do with the matters asserted in the affidavit supporting the motion for a remand, and was properly excluded by the trial court. This assignment of error has no merit.

For the reasons explained herein, the conviction and sentence are affirmed.

AFFIRMED.

APPENDIX 11

STATE of Louisiana

v.

John Anthony SHEEHAN.

No. 90-K-0851.

Supreme Court of Louisiana.

Sept. 14, 1990.

In re Sheehan, John Anthony; – Defendant(s); applying for writ of certiorari and/or review; to the Court of Appeal, Third Circuit, No. CR89-1193; Parish of Avoyelles, 12th Judicial District Court, Div. "B", No. 60622.

Prior report: La.App., 558 So.2d 758.

Denied.

APPENDIX 12

This case also involves the misapplication of 28 U.S.C.A. 2254(d), which provided before the recent AEDPA amendment:

> (1) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination of the State court was erroneous.